Supreme Court, U.S.
FILED
140 No. 09- (1) 09-341 SEP 16 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTHONY D'ARIA,

Petitioner,

v.

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-and-

UBS FINANCIAL SERVICES, INC., a corporation, UBS PAINE WEBBER, a corporation, PAINE WEBBER GROUP, INC., a corporation,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN HALEBIAN
Counsel of Record
ADAM C. MAYES
LOVELL STEWART HALEBIAN LLP
317 Madison Avenue, 21st Floor
New York, New York 10017
(212) 500-5010

Counsel for Petitioner

224697

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Unlike a traditional common fund class action settlement, in which attorney's fees are paid out of the common fund available to the class (and any reduction in fees correspondingly increases the class recovery), the proposed class action settlement in this case includes a *reversionary fee structure* which provides that if the court reduces the proposed fee award, the un-awarded funds revert to the defendants-respondents rather than to the class. Class counsel are in effect paid directly by the defendants-respondents rather than by the class, and the class cannot benefit from any objections to, or judicial reduction of, the proposed fee award, discouraging scrutiny by objectors and the court. In a detailed legal analysis submitted to the American Bar Association's Standing Committee on Ethics and Professional Responsibility, twenty prominent law professors concluded that the increasingly common practice of negotiating such direct payment of attorney's fees by an adversary defendant while simultaneously inhibiting judicial scrutiny of the proposed settlement amounts to a *per se* breach of class counsel's duties to the class. *See* Letter dated Sept. 17, 2007, to ABA Standing Committee on Ethics and Professional Responsibility ("the ABA Letter"), *available at* http://www.fed-soc.org/docLib/20080801_letterto ABA.pdf (last visited Sept. 14, 2009).

The question presented is whether such a reversionary fee structure by its nature breaches the fiduciary duty and ethical obligations that class counsel owe to absent class members and violates the constitutional due process rights of absent class members which are protected by Rule 23 of the Federal Rules of Civil Procedure, precluding approval of a proposed class action settlement.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Marty Evans and Shrenik Bavishi were objectors in the district court and appellants in the Ninth Circuit. Bavishi has separately petitioned this Court for certiorari (No. 08-10952), and Evans has obtained an extension of time to do so (No. 09A136). They are being served herein as respondents.

Lawrence R. Kaufmann was an objector and proposed intervenor-plaintiff in the district court, but was permitted by the court to withdraw from the action pursuant to a private settlement with defendants.

Additional objectors in the district court who are no longer involved in this proceeding include Clinton E. Anderson, Steven D. Arkwright, Jason Cintron, Christopher C. Gabriel, Norman Demetrios Pappous and Geoffrey Earl Wilwerding.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	2
INTRODUCTION	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	10
I. The Reversionary Fee Structure Erroneously Approved by the Ninth Circuit Is a *Per Se* Breach of Class Counsel's Fiduciary Duty and Ethical Obligations to the Class.	12

Contents

Page

II. The Reversionary Fee Structure Improperly Inhibits the Scrutiny of a Proposed Class Action Settlement by Objectors and the Courts for the Protection of Absent Class Members. ... 17

III. The Ninth Circuit's Decision Merits Review Because Class Action Settlements Using the Reversionary Fee Structure Are Already Being Brought from Afar to the Ninth Circuit for Approval. 19

CONCLUSION 21

TABLE OF APPENDICES

Page

Appendix A — Memorandum Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed May 14, 2009 ..... 1a

Appendix B — Order (1) Granting Joint Motion For Final Approval Of Settlement; (2) Granting Class Counsel's Application For Attorney's Fees, Costs And Class Representative Enhancements Of The United States District Court For The Northern District Of California Filed January 26, 2007 ..... 11a

Appendix C — Order Denying Anthony D'aria's Motion To Intervene; Vacating Hearing Of The United States District Court For The Northern District Of California Filed January 17, 2007 ..... 54a

Appendix D — Order Of The United States District Court For The Northern District Of California Dated November 16, 2006 ..... 75a

Appendix E — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petitions For Rehearing Filed May 18, 2009 ..... 79a

TABLE OF CITED AUTHORITIES

Page

Cases

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 3, 9, 12

Basile et al. v. A.G. Edwards & Sons, Inc., Case No. 08 CV 0338 JAH (RBB) (S.D.Cal.) ...20, 21

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) ... 12

Bowman v. UBS Financial Services, Inc., Case No. C-04-03525 MMC (N.D.Cal.) 5, 21

Burns v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., Case No. C-04-04135 MMC (N.D.Cal. 2006) 21

Franklin v. Bank of America N.A., Case No. C 05-00519 CRB, slip op. (N.D.Cal. July 18, 2006) 15

Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000) 16

Hansberry v. Lee, 311 U.S. 32 (1940) 12

In re BankAmerica Corp. Sec. Litig., 350 F.3d 747 (8th Cir. 2003) 11

In re Cendant Corp. Litig., 264 F.3d 201 (3rd Cir. 2001) 11

Cited Authorities

Page

In re Consumer Privacy Cases, 175 Cal.App.4th 545 (1 Dist., June 30, 2009) 19

In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) 3, 12

In re Warner Communications Sec. Litig., 798 F.2d 35 (2nd Cir. 1986) 11

Kakani v. Oracle Corp., 2007 WL 1793774 (N.D.Cal. June 19, 2007) 21

Mirfasihi v. Fleet Mortgage Corp., 450 F.3d 745 (7th Cir. 2006) 11

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1997) ... 10-11

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 12

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003) 17, 18

Steinberg et al. v. Morgan Stanley & Co., Inc., et al., Case No. 06 CV 2628 BEN (NLS) (S.D.Cal.) 20, 21

Cited Authorities

Page

Tarlecki v. Bebe Stores, Inc., 2009 WL 1364340 (N.D.Cal. May 14, 2009) 19, 21

Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991) 16

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332(d)(2) 5

29 U.S.C. § 201 *et seq.* 5

Rules

Fed. R. Civ. P. 23 ..... *passim*

Other Authorities

Cal. Rules Prof. Conduct Rule 3-300(A) and (C) .. 13

U.S. Dept. of Labor Wage and Hour Div. Op. Letter FLSA2006-43 (Nov. 27, 2006) 10

Letter dated Sept. 17, 2007, to ABA Standing Committee on Ethics and Professional Responsibility, *available at* http://www.fed-soc.org/docLib/20080801_lettertoABA.pdf ..... *passim*

MANUAL FOR COMPLEX LITIGATION, § 23.12 (4th ed. 2004) 13

Petitioner Anthony D'Aria respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended memorandum disposition by the Ninth Circuit, which is designated not for publication, is reproduced at App. A. The Ninth Circuit's order denying a petition for rehearing and rehearing en banc, also not for publication, is reproduced at App. E.

The district court's unreported opinion granting final approval of the settlement is reproduced at App. B. The district court's unreported orders denying D'Aria's motion to join or substitute for Objector Kaufmann, and denying D'Aria's motion to intervene, are respectively reproduced at App. D and C.

JURISDICTION

The Ninth Circuit issued its amended memorandum disposition on May 14, 2009, and denied rehearing on May 18, 2009. *See* App. A; App. E. On August 14, 2009, Justice Kennedy granted an extension of time to file this petition until September 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Rule 23 of the Federal Rules of Civil Procedure provides in relevant part:

> *(a) Prerequisites.*
>
> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> . . .
>
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> *(e) Settlement, Voluntary Dismissal, or Compromise.*
>
> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> . . .
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> . . .

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

INTRODUCTION

Petitioner seeks review of the Ninth Circuit's decision approving the use of a reversionary fee structure in a settlement of a class action. A reversionary fee structure in a class action settlement exemplifies the conflicted interests, perverse incentives and potential for collusion which are well recognized by this Court and others as an endemic problem in class action settlements. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995). In a detailed legal analysis submitted to the American Bar Association's Standing Committee on Ethics and Professional Responsibility, a group of twenty prominent law professors, including, *e.g.*, Yale Law's Peter H. Schuck and Columbia's William Simon, concluded that it is at least a presumptive, if not a *per se* breach of class counsel's fiduciary and ethical duties to the class to negotiate direct payment of attorney's fees by an adversary defendant, separate and apart from funds recovered for class members, as occurs when a reversionary fee structure is used. *See* ABA Letter, *supra*, 2, 12-15.

At the same time, the reversionary fee structure directly undermines the protections established by Rule 23 of the Federal Rules of Civil Procedure for the due process rights of absent class members, because the

structure intrinsically discourages scrutiny by objectors and the courts during the settlement approval process—an inhibiting effect that the signatories to the ABA Letter conclude is *per se* unethical. *See* ABA Letter, *supra*, 3, 16-17. It should be noted that the ABA Letter is the only scholarly and detailed analysis of this issue and there is no comparable authority that supports a reversionary fee structure as an acceptable means of structuring a proposed class action settlement.

Review of the Ninth Circuit's decision by this Court presents an opportunity to remedy a widely used, pernicious practice in class action settlements that has gone unchecked in dozens of cases over the past decades and that is otherwise likely to remain uncontrolled. Because the reversionary fee structure effectively insulates egregious conduct from judicial scrutiny, it is not likely to be further challenged elsewhere. The decision below is the first time an appellate court has directly examined a reversionary fee structure, despite the routine use of such structures in the settlement of many wage and hour and other class actions for many years, which simply demonstrates its effectiveness in inhibiting judicial review. The Ninth Circuit is already the venue of choice, for numerous plaintiff's counsel across the country in wage and hour litigation in particular, for approval of class action settlements using this structure to obtain inflated legal fees, and absent correction will no doubt remain so following the decision below.

STATEMENT OF THE CASE

1. The underlying class action alleged that the defendants-respondents ("UBS") misclassified their securities brokers as exempt under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and state labor laws, and asserted claims on behalf of a nationwide class of over 13,000 current and former UBS securities brokers (excluding UBS brokers in California) for unpaid overtime and unlawful wage deductions.

The action was settled before it was filed in the Northern District of California. Originally, plaintiffs-respondents individually commenced three actions on behalf of various classes of UBS brokers outside California, in the District of New Jersey, the Southern District of New York, and the District of Connecticut. Only three months after commencing the first of these actions (and days after filing the third), plaintiffs-respondents reached a proposed settlement with UBS of all nationwide claims outside California. The underlying action here was then commenced in order to consolidate the already settled nationwide (ex-California) claims for settlement approval.

Plaintiffs-respondents filed the case in the Northern District of California, where it was related to *Bowman v. UBS Financial Services, Inc.*, Case No. C-04-03525 MMC, an earlier case in which a similar settlement had been reached (containing an identical reversionary fee structure) for the claims of UBS brokers in California. The district court's jurisdiction was based on minimal diversity under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2).

2. The $45 million gross amount of the *Glass* settlement included both sums that were expressly out of reach of the class (*i.e.*, reversionary proposed awards of legal fees and named plaintiff enhancements), and sums that had no realistic chance of reaching the class (*i.e.*, the full amount of funds that were available to class members only on a claims-made basis).

The settlement agreement provided for class counsel to seek an award of $11,250,000 in attorney's fees, *i.e.*, 25% of the gross amount, plus enhancements for the named plaintiffs totaling $100,000.[1] If the court reduced these proposed awards, any disallowed amounts were subject to reversion to UBS, not to the class, making them unavailable to the class in any circumstances. *See* App. 14a.

The maximum amount actually available to pay class members was the $33,650,000 left after subtraction of the agreed $11.35 million in fees and enhancements. This amount was not paid to class members *pro rata*, but on a claims-made basis. The settlement provided for an agreed formula to evaluate individual claims, calculated to exhaust the available funds only if all class members submitted claims. *See* App. 14a (summarizing formula). The unclaimed funds left over if fewer than all class members submitted claims would revert to UBS.

---

1. Plaintiffs-respondents' counsel did not dispute D'Aria's contention that they could not have expended more than approximately $250,000 in lodestar in the prosecution and settlement of this litigation, so that their fee request represented a multiplier of more than 40 times their lodestar. *Cf.* App. 48a (district court noting that lodestar-based fees would be "substantially lower" than the fee request due to absence of litigation activity prior to settlement).

Ultimately, class members submitted claims for approximately $21 million, *i.e.*, less than half of the gross settlement amount. *See* App. 23a. In effect, class counsel, the named plaintiffs, and UBS divided amongst themselves more of the settlement funds than were paid to the class.

3. D'Aria moved to intervene as a plaintiff with the express purpose of replacing the existing class representatives, whom he alleged had inadequately represented the class in prosecuting and settling the litigation. D'Aria's allegations in the courts below included, among other things:

— The reversionary fee structure breached class counsel's fiduciary and ethical obligations to the class and was designed to discourage scrutiny in the settlement approval process;

— The action's history suggested a collusive, pre-packaged settlement without any intention of adversarial litigation;

— Class counsel conducted minimal investigation of class claims and no adversarial litigation;

— Class counsel relied on UBS data on damages without expert assistance for the class, undervalued class claims, and provided no data to the court to evaluate the recovery;

— The legal fees for plaintiff's counsel provided by the proposed settlement were exorbitant in relation to the negligible prosecution of the action;

— The notice to class members failed adequately to disclose the settlement's reversionary structure, both as to legal fees and as to the overall value of the settlement to class members.

Procedural obstacles thwarted D'Aria. Before D'Aria came forward as a litigant, the same arguments against the proposed settlement were originally raised by another class member, objector and proposed intervenor Lawrence Kaufmann (also represented by D'Aria's counsel here). In an eleventh-hour surprise, however, Kaufmann exited the litigation, disclosing that UBS had secretly negotiated a private settlement with Kaufmann behind the back of his counsel in exchange for withdrawal of his objection and motion to intervene. D'Aria only sought entry into the litigation after Kaufmann unexpectedly withdrew, whereupon D'Aria immediately moved to substitute himself for Kaufmann as both an objector and proposed intervenor. *See* App. 55a-56a (procedural timeline). The district court denied D'Aria's motion on procedural grounds the same day within hours of its filing. *See* App. D. D'Aria then moved to intervene, but the court denied the motion as untimely. *See* App. C. The Ninth Circuit affirmed the district court's denial of D'Aria's motion to intervene on timeliness grounds without analysis of the circumstances. *See* App. 10a.

The procedural merits of D'Aria's efforts to be heard in the courts below—be it as an objector, an intervenor-plaintiff, or both—are immaterial here, however. The settlement approval process established by Rule 23(e) is specifically meant to protect the rights of absent

class members. *See, e.g., Amchem*, 521 U.S. at 620. If D'Aria is correct that the district court abused its discretion in approving an inherently flawed settlement and the Ninth Circuit erred in affirming the district court, then by definition, the interests of D'Aria and other class members were not adequately protected by the present class counsel and D'Aria should have been permitted to object and/or intervene. Thus, if D'Aria is correct on the merits of his argument against settlement approval, then the courts below committed procedural error one way or another when they failed to hear and consider his arguments about settlement approval during the settlement approval process.

4. Even though the Ninth Circuit did not reach D'Aria's arguments concerning settlement approval, it did address the reversionary fee structure in the context of whether the attorney's fees should be approved.[2]

The Ninth Circuit acknowledged that the reversionary fee structure was "problematic because it acts as a device to isolate fees from scrutiny," and because it incentivized inflation of attorney's fees at the expense of funds available to the class. App. 6a-7a. Nevertheless, the Ninth Circuit followed the district court in affirming the reversionary fee structure. In particular, ten months *after* the proposed settlement was reached, the United States Department of Labor issued an opinion letter stating that stockbrokers may under certain circumstances meet the requirements for

---

2. The Ninth Circuit erroneously attributed D'Aria's arguments on the reversionary fee structure to Objector Marty Evans, who appealed on the issue of attorney's fees.

exemption from the Fair Labor Standards Act. *See* DOL WH Op. Letter FLSA2006-43 (Nov. 27, 2006). Because the opinion letter weakened class members' claims under the Act,[3] the district court found that expeditious settlement in advance of the opinion letter justified the attorney's fees. App. 48a-50a. The Ninth Circuit agreed:

> The fact that class counsel achieved such timely results for the class suggest that the class's interests were not compromised by the reversion clause, and that the district court did not abuse its discretion in finding that the settlement was fair and adequate.

App. 8a. In effect, the Ninth Circuit seemed to be saying that illegal or unethical conduct by plaintiffs' class counsel may be overlooked if the court concludes that a proposed settlement in other ways benefitted the class.

REASONS FOR GRANTING THE PETITION

It was not the Ninth Circuit's role, or the district court's, to parse reasons why it might disregard the proposed settlement's inherent violations of duties owed to absent class members and of the procedures established to protect them. Rule 23 among other things protects the constitutional due process rights of absent class members. *See, e.g., Ortiz v. Fibreboard Corp.*, 527

---

3. The Ninth Circuit also noted "forward-looking relief" obtained for the class, App. 8a, referring to changes in UBS compensation policy that were made part of the proposed settlement after it came under challenge during the settlement approval process.

U.S. 815, 845-846 (1997) (describing constitutional rights of absent class members implicated by mandatory class actions aggregating damages claims). Accordingly, during the settlement approval process, the court's responsibilities concerning the rights of absent class members are widely recognized as fiduciary in character. *See, e.g., Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) (district court "functions as a fiduciary of the class, and is subject to the high duty of care that the law requires of fiduciaries"); *In re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 751 (8th Cir. 2003) (district court is "a fiduciary who must serve as guardian of the rights of absent class members"); *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 (3rd Cir. 2001); *In re Warner Communications Sec. Litig.*, 798 F.2d 35, 37 (2nd Cir. 1986).

Both the Ninth Circuit and the district court should have looked no further than the inherently perverse, reversionary fee structure itself to determine that the proposed settlement violated the constitutional due process rights of absent class members. There is no discernible benefit to absent class members in permitting the use of reversionary fee structures in class action settlements, as compared to a traditional common fund settlement where the interests of class counsel and absent class members are more clearly aligned. Rather, for the reasons discussed below, a class action settlement shaped by the ethical conflicts, perverse incentives and procedural distortions of a reversionary fee structure *ipso facto* is not "fair, reasonable and adequate" under Rule 23(e)(2) and should not be approved. For the same reasons, a reversionary fee structure renders adequate representation under Rule 23(a)(4) impossible, and

poses an insurmountable obstacle to settlement-only class certification antecedent to settlement approval. Rule 23(a)(4) requires that named plaintiffs must at all times adequately represent the interests of absent class members, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940)), which also encompasses adequate representation by class counsel. *See, e.g., In re General Motors Corp.*, 55 F.3d at 801. This requirement, which is meant to protect absent class members, demands more, not less judicial attention in settlement-only cases. *Amchem*, 521 U.S. at 620.

I. The Reversionary Fee Structure Erroneously Approved by the Ninth Circuit Is a *Per Se* Breach of Class Counsel's Fiduciary Duty and Ethical Obligations to the Class.

1. In a common fund settlement, although the settlement fund originates from the defendants, class counsel receive their fees from the class, paid out of its recovery. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). As a consequence, if the court orders the proposed attorney's fees to be reduced, a corresponding sum becomes available for distribution to the class.

Under a reversionary fee structure, however, class counsel are in effect paid by the defendant rather than by the class. Attorney's fees cannot be said to come from the class under a reversionary fee structure, because the fund proposed to pay the attorney's fees is permanently separated from the fund available to the class: if the court reduces the proposed fees, defendants simply keep the difference. (The same is also true with

respect to enhancements for named plaintiffs proposed on a reversionary basis.)

Payment by the adversary rather than the client poses a serious conflict of interest for plaintiff's attorneys. In the ABA Letter cited above, the signatory law professors concluded that it is presumptively if not *per se* unethical for plaintiff's attorneys in a contingency fee litigation to negotiate direct payment of their fees by an adversary defendant. *See* ABA Letter, *supra*, 2, 12-15. This conclusion applies with particular force in a class action, where the plaintiff's attorneys owe a fiduciary level of loyalty and care to the class as a whole, *i.e.*, to all absent class members, even before formal class certification.[4] *See* MANUAL FOR COMPLEX LITIGATION, §23.12, n. 753 (4th ed. 2004); *cf.* Fed. R. Civ. P. 23(g)(2)(A) committee note.

---

4. It is worth noting that even the apparent conflict of interest faced by class counsel using a reversionary fee structure defies any easy formal resolution. The usual ethical rules applicable to attorney-client relationships typically may permit an apparent conflict of interest if, *inter alia*, it is fully disclosed to and ratified by the client. *See, e.g.*, Cal. Rules Prof. Conduct Rule 3-300(A) and (C). In a class action, however, such disclosure and ratification by absent class members is scarcely possible. Ratification by the class representatives who are designated to stand in for the absent class members is also problematic, however, because the reversionary fee structure places the class representatives in exactly the same conflict as their counsel: as named plaintiffs, they benefit from enhancement awards which are unavailable to absent class members and are afflicted by the same conflicts as the attorney's fees, *i.e.*, paid directly by the defendant.

2. The interests respectively of class counsel and absent class members sharply diverge when a reversionary fee structure is used, because the structure "creates incentives for the negotiating parties to make the attorneys' fees a larger percentage of the total recovery," as the Ninth Circuit recognized but failed to explore. App. 7a. Strikingly perverse incentives arise when a reversionary fee structure applies to a "claims-made" settlement, as is commonly the case and is presented by the proposed settlement here, *i.e.*, the settlement provides that claimants receive sums calculated to exhaust the fund only if all class members lodge claims, and any unclaimed remainder reverts to the defendant. In such a situation, the use of a reversionary fee structure fosters profound conflicts of interest and even collusion.

Economically, a defendant is motivated to negotiate a claims-made settlement by the expectation that its actual payout to class members, based on the ultimate claims rate, will be smaller than the amount it would have to pay on a non-reversionary, or common fund basis. Class counsel must conversely calculate that the actual payout is likely to be higher than the amount obtainable from the defendant on a non-reversionary basis.

The risk in class counsel's calculation falls only on the class, however, not on class counsel. At best, class counsel are bargaining for a *chance* that class members' will maximize their recovery, while simultaneously bargaining to *assure* that their own fees are maximized. While the class recovery is uncertain, the reversionary structure clearly maximizes attorney's fees because the

base attorney's fee percentage applies to a nominal amount (*i.e.*, the gross settlement amount) which is inflated relative to the class recovery in two distinct respects: First, fees are earned on the proposed awards of fees and enhancements even though these sums can never become available to the class under a reversionary fee structure, *i.e.*, class counsel are being rewarded by the court for obtaining funds that can only be paid to class counsel or revert to defendant, but can never be paid to class members. Second, fees are earned on the entire maximum amount payable to the class even though in a claims-made settlement it is certain to be paid out only fractionally—as Judge Breyer in the Northern District of California observed concerning a proposed fee award based on the maximum amount of a claims-made settlement:

> When the parties settled this lawsuit for $9 million maximum payment amount they did not expect that defendant would actually pay $9 million. . . . Indeed in this Court's experience the claim rate is generally what it is in this case, 40 to 50 percent. Thus, the $9 million figure is a fiction.

Franklin v. Bank of America N.A., Case No. C 05-00519 CRB, slip op. at 6 (N.D.Cal. July 18, 2006) (reducing requested attorney's fee award *sua sponte*). Unlike the recovery for class members, moreover, the attorney's fees do not depend on the ultimate claims rate, but are calculable in advance.[5] Further exacerbating the lopsided

5. The only risk to which class counsel are exposed when relying on such a proposed fee award is the possibility that it may be reduced by a reviewing court, but as discussed below, the reversionary fee structure also defends against this possibility by inhibiting judicial scrutiny.

risk faced by the class, class counsel's economic incentive after the settlement is reached is merely to achieve a claims rate sufficient to garner court approval, not necessarily to maximize the claims rate for the benefit of the class.

At worst, of course, class counsel may not be motivated by some speculative benefit to the class at all, but may instead simply (and illegally) reach a bargain with the adversary defendant to take fees in a substantially larger proportion of the funds available from the defendant in exchange for the defendant's contributing a smaller total amount. *See, e.g., Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52-53 (2d Cir. 2000) (noting "the temptation for the lawyers to agree to a less than optimal settlement 'in exchange for red-carpet treatment on fees,'" quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)). A reversionary fee structure simultaneously provides a vehicle for such collusion against absent class members and (as discussed below) discourages scrutiny by objectors and the courts.

3. In addition, the reversionary fee structure by its nature inflicts a direct pecuniary loss on the class: the loss of access to any part of the proposed fees and enhancements that a reviewing court may ultimately decline to award. Even in the context of a claims-made settlement, where defendants do not expect to pay the full amount set aside for claims, they do expect to pay the full amount of the proposed awards of fees and enhancements that are specified in the settlement agreement. There is therefore no doubt that the sums set aside for such awards were potentially available to

the class if they were part of a common fund for both claims and fees, instead of being severed by the reversionary fee structure; no speculative calculations about the expected claims rate can justify this dead loss to the class.

II. The Reversionary Fee Structure Improperly Inhibits the Scrutiny of a Proposed Class Action Settlement by Objectors and the Courts for the Protection of Absent Class Members.

As the Ninth Circuit noted, a reversionary fee structure operates to insulate the proposed settlement, with all the inherent conflicts and perverse incentives noted above, from scrutiny both by objectors and by the courts:

> A reversion clause for attorneys' fees is problematic because it removes an important economic incentive that class members may have in challenging a fee award that may be excessive under the circumstances. The clause also gives the district court one less reason to challenge an award of attorneys' fees where any reduction would only benefit the defendant, who may have all but admitted to significant violations of the law.

App. 7a, fn.2 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 970 (9th Cir. 2003) (rejecting a condition that would "inhibit district courts from engaging in independent determinations of reasonable fees")).

The signatory law professors to the ABA Letter concluded that direct fee negotiation with defendants that has the effect of inhibiting judicial review is *per se* unethical. ABA Letter, *supra*, 16-18. The tendency of a reversionary fee structure to inhibit review is antithetical to Rule 23, which embodies the directly contrary view that constitutional due process requires that absent class members obtain the benefit of a rigorous review by the court assisted by objectors who are economically motivated to assert objections that ultimately benefit the class.

The continuing and widespread use of the reversionary fee structure in class action settlements approved by the courts (particularly in the Ninth Circuit, as discussed below), shows how effectively the structure discourages judicial scrutiny. This case exemplifies this inhibiting effect, even where class members have come forward to challenge the settlement in detail. Acknowledging at least in general terms that the reversionary fee structure posed conflicts of interest, the Ninth Circuit here held that the district court was "required to 'ensure that the class members' interest were not compromised in favor of those of class counsel.' *See Staton*, 327 F.3d at 964-965." App. 7a. The Ninth Circuit did not examine whether the settlement compromised class members' interests, however; instead, it affirmed on the basis of the district court's findings that events *after the settlement was reached* (notably the Department of Labor's subsequent opinion letter) increased its value to the class, and reasoned indirectly that these results "suggest[ed] that the class's interests were not compromised by the reversion clause." *See* App. 7a-8a.

This reasoning contains more evasion than analysis. The Ninth Circuit failed to recognize that the reversionary fee structure is itself an impermissible compromise of absent class members' interests. Absent class members cannot be said to have obtained due process under Rule 23 in the course of the approval of a proposed settlement affecting their interests if that very approval process is corrupted by breaches of fiduciary duty and ethical obligations by class counsel that are simply overlooked by the district court or the Court of Appeals because class members benefitted in other ways from the settlement.

III. The Ninth Circuit's Decision Merits Review Because Class Action Settlements Using the Reversionary Fee Structure Are Already Being Brought from Afar to the Ninth Circuit for Approval.

No prior authority approves a reversionary fee structure in a class action settlement, as the Ninth Circuit noted in its decision below.[6] App. 7a, fn.2. This is despite the fact that the structure has been widely

---

6. Since then, a Court of Appeal of the State of California has also approved a reversionary fee structure in a class action settlement, dismissing an appeal on the issue of attorney's fees by an objector represented by the same counsel as Objector Marty Evans in the instant case. *In re Consumer Privacy Cases*, 175 Cal.App.4th 545 (1 Dist., June 30, 2009). One district court in the Northern District of California, however, has cited the inhibiting effect of a reversionary fee structure on fee scrutiny as the reason for declining to approve a proposed class action settlement under Rule 23(e). *Tarlecki v. Bebe Stores, Inc.*, 2009 WL 1364340 (N.D.Cal. May 14, 2009).

and regularly used for many years, particularly in settlement of wage and hour class actions. During oral argument in the Ninth Circuit, defendants-respondents' outside counsel observed that "a reversion clause is common in the resolution of wage and hour class actions. Of the hundreds that I have settled, I could not [sic] count on one hand the number that are not reversionary." *D'Aria v. UBS Financial*, Case No. 07-15278 audio recording (Jan. 14, 2009), *available at* <http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002615> (last visited Sept. 16, 2009), at 16 min. 28 sec. (responding to question about justification for the reversionary fee structure from Noonan, J.). Further significant caselaw on the structure is unlikely to develop, not only because it effectively discourages review (as discussed above), but because the reversionary fee structure is thriving in the Ninth Circuit, where it has now been officially approved in the instant case.

California courts have become a magnet for nationwide settlements of the type presented here. For example, two other nationwide wage and hour class actions involving overtime and related claims by securities brokers were recently approved in the Southern District of California: *Steinberg et al. v. Morgan Stanley & Co., Inc., et al.*, Case No. 06 CV 2628 BEN (NLS) (S.D.Cal.), and *Basile et al. v. A.G. Edwards & Sons, Inc.*, Case No. 08 CV 0338 JAH (RBB) (S.D.Cal.). Both cases proposed claims-made settlements with reversionary attorney's fee awards. Both cases also represent major nationwide class actions brought to the federal courts in California for settlement-only proceedings even though they have nothing to do with

the State of California—like the instant *Glass* action, the proposed settlements exclude California brokers.[7]

Some other cases in the Ninth Circuit using reversionary fee structures include, *e.g.*, *Bowman v. UBS Financial Services*, *supra* (settlement and fee request finally approved); *Burns v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, Case No. C-04-04135 MMC (N.D.Cal. 2006) (settlement and fee request finally approved); *Kakani v. Oracle Corp.*, 2007 WL 1793774 (N.D.Cal. June 19, 2007) (denying preliminary settlement approval for other reasons); and *Tarlecki v. Bebe Stores*, *supra* (denying settlement approval on grounds of reversionary fee structure).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN HALEBIAN
Counsel of Record
ADAM C. MAYES
LOVELL STEWART HALEBIAN LLP
317 Madison Avenue, 21st Floor
New York, New York 10017
(212) 500-5010

Counsel for Petitioner

---

7. The *Steinberg* settlement excludes California brokers from its non-managerial classes, but includes them in its manager class. *Basile* excludes California brokers altogether.

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 14, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15278

D.C. No. CV-06-04068-MMC

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor - Appellant.

Appendix A

No. 07-15309

D.C. No. CV-06-04068-MMC

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs,

and

MARTY EVANS,

Plaintiff - Appellant,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor.

Appendix A

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted January 14, 2009
San Francisco, California

Filed May 14, 2009.

Before FARRIS, NOONAN and McKEOWN, Circuit Judges.

MEMORANDUM*

This dispute arises from the district court's approval of a class action settlement between the named plaintiffs and the defendant, UBS Financial Services. On appeal, plaintiff-objector Marty Evans raises several objections to the district court's determination that the settlement was fair, reasonable, and adequate as required by Fed. R. Civ. P. 23(e). Appellant Anthony D'Aria objects to the district court's denial of his motion to intervene in the case on the grounds that it was untimely. The parties are familiar with the facts.

I. *Pending motions*

We grant UBS's motion to strike documents from D'Aria's excerpts of record which were submitted to the

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

district court after the final approval of the settlement. *See Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077-78 (9th Cir. 1988). We also grant UBS's motion for judicial notice of the *Bowman* declaration.

II. *Evans's Claims*

Evans argues, on several grounds, that the district court abused its discretion in determining that the settlement was fundamentally "fair, reasonable, and adequate," as required by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23(e). "The district court's decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof." *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000) (internal citations omitted). Each of Evans' arguments is addressed below.

First, Evans argues that because the named plaintiffs are all former employees of defendants, they cannot fairly and adequately represent a class that includes both current and former UBS employees. ER 474. A class action may be maintained only if "the representative parties will fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). The present settlement aims to provide compensation for unlawful practices occurring during the class period. For that period, "both the former and current employees are equally interested in obtaining compensation for the assertedly unlawful practices set forth in the complaint."

ER 475.[1] Therefore, the district court did not abuse its discretion in finding that the class-representatives adequately represented the interests of the class. *See Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) ("this circuit does not favor denial of class certification on the basis of speculative conflicts").

Second, Evans argues that the court violated the rights of class members from states other than New York, Pennsylvania, and New Jersey by approving a plan of allocation that distributes a greater proportion of the settlement funds to class members in those states. ER 63. The Special Master and the district court found that the parties had set forth a reasoned basis for treating claimants employed in these three states differently from claimants in other jurisdictions. ER 479; *see also*, JSER 197(Special Master's report concluding that the disproportionate allocation was justified by differences among the states regarding "the definition of employees; the definition of wages; various exemptions; varieties of allowed or disallowed deductions from employee compensation; elements of the causes of action available in various states; and variances in the recoveries of the debt, interest, attorneys' fees, costs and penalties"). On appeal, Evans does not address the substance of the parties' or the court's reasoning, nor does he address the differences in law between the

1. As the district court noted, the settlement does not preclude any class member from filing suit against UBS for violation of the law occurring outside of the class period. ER 475.

states at issue. Moreover, the fact that one of the named plaintiffs was a class member from a state other than New York, New Jersey, and Pennsylvania, undermines Evans's allegations of inadequate representation. ER 461, n. 1. Therefore, the district court did not abuse its discretion in rejecting Evans's objection to the plan of allocation.

Third, Evans argues that the district court erred in appointing a Special Master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, without first obtaining consent from Evans. ER 476; Fed. R. Civ. P. 53. Rule 53(a) permits the appointment of a Special Master for, among other things, the "perform[ance of] duties consented to by the parties," or without consent when appointment is warranted by "the need to perform an accounting or resolve a difficult computation of damages." *See* Fed. R. Civ. P. 53(a)(1)(A)-(C). In this case the named plaintiffs representing the class and the defendant together requested the appointment of the Master to address the parties' damages analysis. This is sufficient to justify the appointment of a special Master.

Fourth, Evans challenges a provision in the settlement stating that any reduction in attorneys' fees by the court will revert to the defendant, rather than to the class. ER 63-64. We agree that the reversion clause, as pertaining to attorneys' fees, is problematic because it acts as a device to isolate fees from scrutiny. *See Staton v. Boeing Co.*, 327 F.3d 938, 964-965, 970-71

(9th Cir. 2003).[2] In addition to being favorable to class counsel, the reversion clause is favorable to UBS, which will receive the ultimate benefit of any reduction by the court. Because the reversion clause creates incentives for the negotiating parties to make the attorneys' fees a larger percentage of the total recovery, the district court is required to "ensure that the class members' interest were not compromised in favor of those of class counsel." *See Staton*, 327 F.3d at 964-65.

Here, the district court found that the class members obtained exceptional results for the class. ER 483-84. Notably, the class representatives were able to negotiate the settlement before the Department of Labor issued an Opinion Letter that would have reduced the value of plaintiffs' claims. *See* ER 465; 483-84. The

---

2. While clauses mandating the reversion of unclaimed funds may be common, appellees cite to no cases approving a settlement with a reversion clause for attorneys' fees. *See* UBS Brief at 101-02. In fact, the Ninth Circuit in *Staton* stated that ordinarily, "after the court determines the reasonable amount of attorneys' fees, all the remaining value of the fund belongs to the class rather than reverting to the defendant." 327 F.3d at 971. A reversion clause for attorneys' fees is problematic because it removes an important economic incentive that class members may have in challenging a fee award that may be excessive under the circumstances. The clause also gives the district court one less reason to challenge an award of attorneys' fees where any reduction would only benefit the defendant, who may have all but admitted to significant violations of the law. *See Staton*, 327 F.3d at 970 (rejecting a condition that would "inhibit district courts from engaging in independent determinations of reasonable fees").

court also acknowledged evidence of additional value in the settlement in the form of forward-looking relief. *See* ER 475, n. 7; JSER 114-15. The fact that class counsel achieved such timely results for the class suggest that the class's interests were not compromised by the reversion clause, and that the district court did not abuse its discretion in finding that the settlement was fair and adequate.

Finally, Evans argues that the court's approval of an attorneys' fees award consisting of 25% of the total award constitutes an abuse of discretion. While we agree that the court's award of attorneys' fees is high relative to the total class recovery, the question on appeal "is not whether the district court should have applied some other percentage, but whether in arriving at its percentage it *considered all the circumstances of the case* and reached a *reasonable* percentage." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (emphasis added). In reviewing the award of attorneys' fees, the district court properly performed an informal lodestar cross-check, and noted the relatively low time-commitment by plaintiff's counsel. *See* Hearing Transcript of January 19, 2007 (Dkt.238); ER 483; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)(suggesting a lodestar cross-check and adjustment in special circumstances when "the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors"). Having acknowledged that the lodestar factors weigh against a substantial award, the district court did not abuse its discretion in giving weight

to other factors, such as the results achieved for the class and the favorable timing of the settlement. *See Vizcaino*, 290 F.3d at 1047-50. Under these circumstances, the court's ultimate award of 25% was not unreasonable. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (referring to 25% in attorneys' fees as a "benchmark award"). Further, the court's calculation of 25% of the total award, rather than 25% of the amount actually collected by the class, was proper, and was in line with Ninth circuit precedent. *See id.* (discussing awards of 25% of *the common fund* as benchmark figure).

Evans also argues that the district court abused its discretion in using the percent-of-recovery approach (rather than the lodestar multiplier approach) in calculating attorneys' fees. However, "[i]n 'common-fund' cases where the settlement or award creates a large fund for distribution to the class, the district court has discretion to use either a percentage or lodestar method." *Hanlon*, 150 F.3d at 1029 (internal citations omitted). Similarly, Evans' contention that the district court erred in using common fund principles in assessing the award of attorneys' fees is inconsistent with Ninth Circuit jurisprudence, which permits the application of common fund principles where-as in the present case-the class of beneficiaries is identifiable and the benefits can be traced in order to allocate the fees to the class. *See Petition of Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985) (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 265 n. 39 (1975)).

Therefore, the district court did not abuse its discretion in approving the settlement, including the award of attorneys' fees, as fair, reasonable, and adequate.

III. *D'Aria's Claim*

In order to challenge the fairness of the settlement or the reasonableness of class counsel's fees, D'Aria must either submit a timely objection to the settlement or be granted leave to intervene. D'Aria failed to submit a timely objection to the settlement. One month after the deadline to opt out of the settlement, D'Aria sought to intervene in the suit as a matter of right, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 24(a); ER 448. The district court properly denied D'Aria's motion to intervene as of right because D'Aria's motion was untimely. *See* ER 451-454.

The district court's decision is AFFIRMED.

APPENDIX B — ORDER (1) GRANTING JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT; (2) GRANTING CLASS COUNSEL'S APPLICATION FOR ATTORNEY'S FEES, COSTS AND CLASS REPRESENTATIVE ENHANCEMENTS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 26, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER (1) GRANTING JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT; (2) GRANTING CLASS COUNSEL'S APPLICATION FOR ATTORNEY'S FEES, COSTS AND CLASS REPRESENTATIVE ENHANCEMENTS

(Docket Nos. 183, 185)

Appendix B

Before the Court are two motions filed January 5, 2007: (1) the parties' joint motion for final approval of settlement; and (2) class counsel's application for attorney's fees, costs, and class representative enhancements. On January 19, 2006, the Court held a fairness hearing. Having considered the papers filed in support of the motions, and the arguments of counsel for the parties and for objector Marty Evans at the fairness hearing, the Court rules as follows.

BACKGROUND

The instant class action is asserted on behalf of a class consisting of all persons who, at any time during the applicable statute of limitations, are or were employed as stockbrokers at any of the brokerage offices of UBS Financial Services Inc. or its predecessors, UBS Paine Webber and Paine Webber Group Inc., anywhere in the United States or its territories, excluding California. (*See* Compl. ¶ 1.) Plaintiffs Joseph Glass, Dante DiFrancesco, Ralph Carbone, and David Bachrach allege that they worked as stockbrokers for defendant UBS Financial Services, Inc. and/or its predecessors UBS Paine Webber and Paine Webber Group, Inc. (*See id.* ¶¶ 7-10.) The first four causes of action are for failure to pay overtime wages in violation of the federal Fair Labor Standards Act, and New Jersey, New York, and Connecticut law.[1] (*See id.* ¶¶ 27-55.) The fifth, sixth,

1. Glass and Bachrach allege they worked for defendants in New Jersey. (*See* Compl. ¶¶ 7, 10.) DiFrancesco alleges he worked for defendants in New York. (*See id.* ¶ 8.) Carbone alleges he worked for defendants in Connecticut. (*See id.* at 9.)

and seventh causes of action are for improper deductions from wages in violation of New Jersey, New York, and Connecticut Law. (*See id.* ¶¶ 56-70.)

The action was settled on January 31, 2006 during a mediation conducted by David Rotman, who, defense counsel attests, is "one of the preeminent mediators of employment law claims in the country." (*See* Wilcox Decl. ¶ 3.) On July 28, 2006, the parties filed a joint motion for preliminary approval of the proposed settlement. The amended joint stipulation of settlement provides for a maximum payment of $45,000,000 to a class consisting of "all persons who work or worked for UBS in the Covered Positions during the Covered Period in the United States including United States territories, and excluding the state of California." (*See* Amended Joint Stipulation of Settlement ¶¶ 5, 29(a).) "UBS" is defined to include "UBS Financial Services, Inc. and all of its officers, directors, agents, attorneys, parents, predecessors (including UBS Paine Webber and Paine Webber Group Inc.), successors, subsidiaries, and related and affiliated entities, including UBS International, Inc." (*See id.* ¶ 2.) The "covered positions" are defined as "job codes 226 and 008226, Unregistered Trainee; job codes 456 and 008456, Broker; and job codes 457 and 008457, Registered Trainee at UBS." (*See id.* ¶ 14.) The "covered period" varies depending on "the applicable statute of limitations period for the jurisdiction in which the Class Member was employed." (*See id.* ¶ 13 and Ex. E.)

Appendix B

The proposed settlement further provides that of the $45,000,000 settlement amount, the following amounts will be deducted, subject to court approval: (1) attorney's fees and litigation costs in an amount up to $11,250,000; (2) "enhancements" to the four named class representatives, in an amount up to $100,000 ($25,000 each); and (3) a "reasonable amount" to the Claims Administrator to administer the settlement. (*See id.* ¶ 29(a).) The settlement provides that all unclaimed funds will revert to UBS, as well as any portion of the maximum $11,500,000 in attorney's fees and $100,000 in enhancements that is not awarded by the Court. (*See id.* ¶¶ 29(b), 30-31.)

Each class member who participates in the settlement will receive a fixed payment from the settlement fund based on the number of months or partial months he or she worked in a covered position for the period between the commencement of the applicable statute of limitations for the state or territory in which that class member worked for UBS and the date of preliminary approval. (*See id.* ¶ 32(c).) The Class Notice provides that class members who worked in New York, New Jersey, or Pennsylvania will receive $120.00 for each full or partial month worked during the class period, while class members who worked in other states will receive $75.00 for each full or partial month worked during the class period.[2] (*See* Class Notice at 3 ¶ C.)

---

2. According to the settlement, "The formula developed by the parties allocates a greater proportion of the settlement funds to class members in New York, New Jersey, and (Cont'd)

Appendix B

On August 25, 2006, the Court granted preliminary approval of the settlement and set a fairness hearing for January 19, 2007. Pursuant to the Class Notice, any objections to the settlement were required to be mailed on or before November 14, 2006. (*See* Class Notice at 7 ¶ C.)

The Court received objections to the settlement from the following class members: (1) Clinton E. Anderson ("Anderson"), dated September 20, 2006; (2) Norman Demetrios Pappous ("Pappous"), dated September 20, 2006; (3) Steven D. Arkwright ("Arkwright"), dated September 21, 2006; (4) Jason Cintron ("Cintron"), dated September 26, 2006; (5) Geoffrey Earl Wilwerding ("Wilwerding"), dated October 18, 2006; (6) Christopher C. Gabriel ("Gabriel"), dated November 7, 2006; (7) Marty Evans ("Evans"), dated November 14, 2006; and (8) Shrenik Bavishi ("Bavishi"), dated November 14, 2006. Evans also filed supplemental objections, dated December 21, 2006, relating to the Court's appointment of a special master. In addition, the Court, on January 8, 2007, granted the motion of the Attorney General of the State of New York ("New York Attorney General") to appear as amicus curiae, and the New York Attorney General has filed an amicus brief raising its concerns about the settlement.

(Cont'd)
Pennsylvania than to class members in other jurisdictions because the law and litigation activity regarding wage deductions in other jurisdictions likely would have caused the parties to devote disproportionate resources to the litigation with uncertain results." (*See id.* ¶ 29(b).)

Additionally, class member Lawrence R. Kaufmann ("Kaufmann") filed a motion to intervene, which motion contained objections to the settlement. Kaufmann subsequently withdrew the motion. By orders filed November 16, 2006 and January 17, 2007, the Court permitted Kaufmann to withdraw, respectively, both his motion to intervene and his objections to the proposed settlement. After Kaufmann withdrew his motion to intervene, class member Anthony D'Aria filed a motion to adopt Kaufmann's objections and a motion to intervene in the action. By orders filed November 16, 2006 and January 17, 2007, respectively, the Court denied D'Aria's motions.

On December 7, 2006, pursuant to the joint motion of the parties, the Court appointed the Honorable Charles A. Legge (hereafter "Judge Legge") as a special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, "to review issues or questions . . . relative to the allocation among different states of the settlement proceeds" and to "determine whether the allocation formula in the settlement is fair, reasonable and adequate in light of any timely challenges to that allocation." (*See* Order Appointing the Honorable Charles Legge as Master Pursuant to the Stipulation of the Parties ("Stipulated Appointment Order"), filed Dec. 7, 2006, at 2-3.) Pursuant to such authority, Judge Legge held a hearing on the matter on January 4, 2007, and, on January 12, 2007, filed a "Report, Findings and Recommendations of the Master."

Appendix B

LEGAL STANDARD

The Court may approve a class action settlement "only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(1)(C). "Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

"It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.* "The settlement must stand or fall in its entirety." *Id.* The Court may not delete, modify, or rewrite particular provisions of the settlement. *See id.* "Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." *See id.*

Appendix B

DISCUSSION

A. Joint Motion for Final Approval

1. Strength of case

The Court is aware of no controlling federal or state authority on the issue of whether stockbrokers are entitled to overtime pay. As set forth below, the legal uncertainty at the time of settlement with respect to whether stockbrokers are entitled to overtime under federal and state law thus favors settlement of the instant action.

The FLSA contains various exemptions from its requirement that employers pay their employees time and a half for work in excess of 40 hours per week, including, in particular, an exemption for "any employee employed in a bona fide . . . administrative . . . capacity." *See In re Farmers Insurance Exchange,* 466 F.3d 853, 858-59 (9th Cir. 2006); *see also* 29 U.S.C. § 213(a)(1). After the instant settlement was negotiated, one federal district court held the question of whether the stockbroker plaintiffs therein had performed work qualifying for such "administrative exemption" presented a triable issue of material fact that precluded summary judgment. *See Takacs v. A.G. Edwards and Sons, Inc.*, 444 F. Supp. 2d 1100, 1110-13 (S.D. Cal. 2006). Thereafter, on November 27, 2006, the Department of Labor issued an Opinion Letter stating that stockbrokers, to the extent they perform certain duties, meet the requirements of the administrative exemption

and, thus, are not entitled to overtime under the FLSA. (*See* Wilcox Decl. Ex. I at 8.) Although not binding authority, courts "must give deference to the DOL's interpretation of its own regulations through, for example, Opinion Letters." *See Farmers*, 466 F.3d at 860. No court to date has determined the appropriate amount of deference to be afforded the November 27, 2006 Opinion Letter. As the parties note, "[t]he bottom line is that the law in this area is sparse and the outcome of any litigation was far from clear, for either UBS or the Plaintiffs."

Accordingly, this factor supports approval of the settlement.

2. The risk, expense, complexity, and likely duration of further litigation

In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *See In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial.

Accordingly, this factor supports approval of the settlement.

3. The risk of maintaining class action status throughout the trial

As the parties observe, the proposed settlement "accords every Covered Employee in every state the right to participate in the claim procedure without regard to factual and legal idiosyncrasies in their claims." (*See* Motion at 9:4-5.) Because the instant class covers employees who worked in every state other than California, the Court agrees with the parties that "[g]iven the diverse law that surrounds overtime eligibility and wage deductions across the country," it was by no means certain that plaintiffs would have been able to obtain certification of "the wall-to-wall class that UBS is willing to accept for settlement purposes." (*See* Motion at 9:5-8.)

Accordingly, this factor supports approval of the settlement.

4. The amount offered in settlement

In determining whether the amount offered in settlement is fair, the Ninth Circuit has suggested that the Court compare the settlement amount to the parties' "estimates of the maximum amount of damages recoverable in a successful litigation." *See In re Mego Financial Corp. Securities Litigation*, 213 F.3d at 459. "[A] cash settlement amounting to only a fraction of the

potential recovery does not per se render the settlement inadequate or unfair," however. *See id.*

Here, the parties represented to the Court at the preliminary approval hearing that the amount of the settlement constituted approximately 25 to 35% of the amount of damages plaintiffs could have hoped to prove at trial. (*See* New York Attorney General Decl. Ex. 1 (Transcript of Aug. 11, 2006 preliminary approval hearing) at 13:1-14:5.) The parties provided support for that calculation at the January 19, 2007 final fairness hearing. The Court finds a settlement based on such percentage reasonable in light of the uncertainties involved in the litigation.

Accordingly, this factor supports approval of the settlement.

5. The extent of discovery completed and the stage of the proceedings

Here, no formal discovery took place prior to settlement. As the Ninth Circuit has observed, however, "[i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *See In re Mego Financial Corp. Securities Litigation*, 213 F.3d at 459. In that regard, plaintiffs state that prior to mediation, plaintiffs' counsel "receiv[ed] informal discovery relating to the types and amounts of deductions taken by UBS, the months worked, and the

salaries of UBS financial advisors," as well as "the benefit of information and documents given to [counsel] by [ ] many current and former UBS brokers." (*See* McInerney Decl. ¶ 13.) In addition, plaintiffs' counsel attests, he "deposed a consultant for UBS regarding the methodology of gathering the data that was provided at the mediation" and "received absolutely no indication that any of the material provided by UBS was incorrect." (*See id.* ¶ 16.)

Accordingly, this factor supports approval of the settlement.

6. The experience and views of counsel

The settlement was negotiated and approved by experienced counsel on both sides of the litigation, with the assistance of a well-respected mediator with substantial experience in employment litigation. Accordingly, this factor supports approval of the settlement.

7. The presence of a governmental participant

One of the factors the Court may consider in evaluating the fairness of a settlement is "the presence of a governmental participant." *See Hanlon v. Chrysler Corp.*, 150 F.3d at 1026. The participation of a governmental entity "serves to protect the interest of the class members." *See Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977). There is no

indication that any governmental entity participated in the settlement of the instant action.

Accordingly, this factor favors neither approval nor disapproval of the settlement.

8. The reaction of the class members to the proposed settlement

On September 15, 2006, notice of the settlement was mailed to 13,176 class members. (*See* Holland Decl. ¶ 6.) As of January 4, 2007, the parties had received 6684 claim forms, representing approximately 51% of the total class members. (*See id.* ¶ 11.) The claim forms submitted seek compensation for a total of 241,609 qualified full or partial months worked during the class period, representing approximately 63% of a total of 386,271 qualified full or partial months worked by the class during the class period. (*See id.* 11.) The claims submitted seek payment of approximately $21,133,928 from the settlement fund. (*See id.*)

As of January 4, 2007, class members had submitted 280 requests to opt out of the settlement, representing an opt-out rate of approximately two percent. (*See id.* ¶¶ 16-18.) As noted above, timely objections to the settlement were submitted by eight class members and, as amicus, the New York Attorney General.

Appendix B

a. Objections by New York Attorney General

The objections of the New York Attorney General fall into three general categories. First, the New York Attorney General contends the settlement is unfair to New York class members because the recovery for each New York class member is less than the amount each California class member received in the settlement of the related action, *Bowman v. UBS*, C-04-3525. Second, the New York Attorney General objects to the requested attorney's fee award as excessive. Third, the New York Attorney General contends that the attorney's fee award provision of the settlement is contrary to Ninth Circuit authority as set forth in *Staton v. Boeing*, 327 F.3d 938 (9th Cir. 2003) and, as such, requires rejection of the settlement. The Court will address the New York Attorney General's substantive objections below, and will address its objections to the amount of fees sought in connection with class counsel's application for attorneys' fees.

i. Comparison to *Bowman* Settlement

The *Bowman* action, although addressing issues similar to those raised by the instant action, was an entirely separate and distinct case. In *Bowman*, a class of California stockbrokers, represented by different counsel than those representing the *Glass* plaintiffs, asserted claims under the FLSA and California law for unpaid overtime and improper wage deductions.

Bowman was settled before any of the three cases ultimately consolidated as the *Glass* action was filed.

Because *Bowman* and *Glass* are separate actions that were separately litigated and separately settled, any direct comparison of the *Bowman* and *Glass* settlements is unwarranted. Indeed, even if the two actions were otherwise indistinguishable, a settlement for a lesser amount nonetheless may constitute a fair, reasonable, and adequate compromise of the dispute. Settlements by their very nature are not intended to provide full compensation for the claimed losses and consequently cannot be calculated with the same precision as actual damages. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) (noting existence of "range of reasonableness" with respect to any settlement).

Moreover, defendants have submitted a response to the New York Attorney General's amicus brief, setting forth in detail the reasons for their belief that their defenses to plaintiffs' claims are stronger under New York law than under California law and, accordingly, why defendants were willing to settle the California claims for a higher amount per class member. In response, the New York Attorney General now concedes there is a "major difference" between New York and California overtime laws and, in particular, that "it is significantly easier to meet the FLSA (and New York) administrative exemption, greatly increasing the risk that New York as compared with California brokers would be found exempt from overtime law." (*See* New York Attorney

General's Reply at 3:1-4.) Additionally, the New York Attorney General now acknowledges that "longer working hours in California . . . might explain a portion of the greater monetary recovery available in the *Bowman* settlement." (*See id.* at 4:12-13.) Although the New York Attorney General continues to take issue with defendants' arguments that California law on the wage deduction claims and availability of penalties is more favorable to plaintiffs than New York law, the Court finds the undisputed differences between California law and New York law with respect to the overtime claims suffices to justify the differences between the *Bowman* and *Glass* settlements.

Accordingly, the Court finds the differences between the *Bowman* and *Glass* settlements do not warrant rejection of the instant settlement.

ii. Attorney's Fees

As noted above, the New York Attorney General's objections to the amount of attorney's fees sought will be addressed below in connection with class counsel's motion for attorneys' fees.

iii. *Staton v. Boeing*

The New York Attorney General argues that the Ninth Circuit's opinion in *Staton v. Boeing* requires rejection of the proposed settlement. In particular, the New York Attorney General reads that decision to hold a settlement that provides for class counsel's seeking a

specified percentage of a common fund, with a reversion to the defendant of any portion of the requested amount not granted by the court, " 'allows too much leeway for lawyers representing a class to spurn a fair, adequate and reasonable settlement for their client in favor of inflated attorney's fees.' " (*See* Amicus Brief at 17:11-15 (quoting *Staton*, 327 F.3d at 969-70).

The language from *Staton* on which the New York Attorney General relies does not stand for the broad proposition asserted by the New York Attorney General. In *Staton*, the settlement therein at issue provided for an award of a fixed amount of attorneys' fees, which fees were not subject to court review. *See Staton*, 327 F.3d at 944-45; *see also id.* at 969 ("The parties negotiated the amount of attorneys' fees awarded as a term of the settlement agreement and thus conditioned the merits settlement upon judicial approval of the agreed-upon fees."). The Ninth Circuit found the lack of any provision for judicial review of the fees created a risk that class counsel would "spurn a fair, adequate and reasonable settlement for their clients in favor of inflated attorneys' fees," and held that "in order to obtain fees justified on a common fund basis, the class's lawyers must ordinarily petition the court for an award of fees, separate from and subsequent to settlement." *See id.* at 945.[3] Here,

---

3. Although, as the New York Attorney General correctly notes, the Ninth Circuit described with approval a procedure by which the parties would agree to the amount of a common fund and provide for court determination of the amount of fees to be awarded from the fund, with distribution of the remainder

(Cont'd)

by contrast, the settlement expressly provides for a determination by the Court of the amount of fees to be awarded to class counsel. (*See* Amended Joint Stipulation of Settlement ¶ 29(a).) Although the settlement further provides that if the Court does not award the maximum amount of $11,250,000 in fees, the difference between that figure and the amount actually awarded will be returned to defendants, such provision does not conflict with *Staton;* the provision for court review of the amount of fees awarded adequately addresses the Ninth Circuit's concern that class counsel might negotiate "an excessive fee at the expense of the class." *See id.* at 972.

Accordingly, the Court finds *Staton* does not warrant rejection of the settlement.

b. Objections of Anderson, Arkwright, Wilwerding, and Gabriel

Class members Anderson, Arkwright, Wilwerding, and Gabriel do not object to any particular provision of the settlement. Rather, each objects to the filing of the *Glass* action in the first instance. In particular, Anderson states that he is "offended" by "Financial Advisers who sue to 'recover' overtime and business expenses when they knew full well how [the] industry's compensation

---

(Cont'd)
"to the class rather than reverting to the defendant," *see id.* at 972, the Ninth Circuit stressed that such procedure was but one permissible alternative and that it did "not mean to preclude all others," *see id.* at 972 n. 22.

structure works"; he further states he wishes to "register [his] disgust at this lawsuit and settlement." (*See* Anderson Objection at 2.) Likewise, Arkwright expresses the opinion that the instant action "is shameful and disturbing" and contends that "[t]hc people involved in bringing this action should try to work, earn an honest living and do the right thing instead of sucking of[f] others like a leach." (*See* Arkwright Objection at 1 (emphasis deleted).) Wilwerding states that he "object[s] to the entire settlement" because the plaintiffs "were never promised any compensation for overtime when they hired on"; he further offers his opinion that the instant action "is a pure opportunistic case which [in] the end result does no more than hurt the investors whom we serve."[4] (*See* Wilwerding Objection at 1-2.) Gabriel states that the suggestion that "UBS somehow has mistreated [him] is an affront to both [his] own positive experiences and to the closely-guarded reputation of th[e] firm" and expresses the opinion that "all of the time and money wasted by this sorry lawsuit could have been deployed productively elsewhere by UBS and all involved." (*See* Gabriel Objection at 1-2.)

As each of the above-referenced objections challenges the filing of the lawsuit, and not the fairness of either the settlement as a whole or any particular provision thereof, such objections do not support rejection of the settlement. Anderson, Arkwright, Wilwerding, and Gabriel were free to opt out if they did not wish to participate in the instant litigation, and Wilwerding in fact did so.

---

4. Wilwerding also expressly opted out of the instant action. (*See* Wilwerding Objection at 4.)

c. Objections of Pappous

Pappous objects to the allocation of settlement proceeds. In particular, Pappous argues that "the cost of [his] labor was just as much in Virginia as it was in New Jersey, Pennsylvania, or New York" and that there "is no justifiable methodology which allocates 60% more ($75 vs. $120) to the individuals who worked in" New Jersey, Pennsylvania and New York. (*See* Pappous Decl. at 1.)

The parties, however, do not purport to compensate class members from New Jersey, Pennsylvania, and New York at a higher rate because Financial Advisers in those states have higher salaries, but rather because their legal claims are more valuable in those states than the claims of class members in other jurisdictions.

Accordingly, Pappous's objection does not warrant rejection of the settlement.

d. Objections of Cintron

Cintron asserts two objections to the proposed settlement. At the outset, Cintron argues that the settlement fails to compensate him for the actual amount of overtime he worked. Cintron misunderstands the purpose of the settlement, which is not to provide full compensation for all overtime hours each class member worked, but to compensate class members for the value of their legal claims to overtime pay. As the parties point out, the recent Opinion Letter from the Department of

Appendix B

Labor provides support for UBS's contention that class members' are unlikely to be able to prove their entitlement to any overtime pay under the FLSA. The Court finds this objection does not warrant rejection of the settlement. Additionally, Cintron objects to the amount of attorneys' fees sought by plaintiffs' counsel. The Court will address such objection below in connection with class counsel's motion for attorney's fees.

e. Objections of Bavishi

Although Bavishi has submitted objections to the settlement, he also has opted out. (*See* Holland Decl. ¶ 23 and Ex. A.) Consequently, as Bavishi is no longer a class member, he has no standing to object.[5] *See* Fed.R.Civ.P. 23(e)(4)(A) (providing "any class member may object to a proposed settlement"); *Mayfield v. Barr*, 985 F.2d 1090 (D.C.Cir.1993) (holding "[t]hose who are not class members, because they are outside the definition of the class or have opted out" lack standing to object to class settlement); *Jenson v.*

---

5. On January 17, 2007, Bavishi filed a motion to opt back into the settlement. Because Bavishi, by such motion, seeks to assert an untimely claim, and because the settlement provides that the claims administrator "will perform the duties of . . . resolving any disputes regarding claims by the Class Members" and will "timely notify class claimants whose claims are untimely or denied for other reasons," (*see* Amended Joint Stipulation of Settlement ¶¶ 3, 46), Bavishi's motion is hereby DENIED without prejudice to his making such request of the claims administrator.

Continental Finance Corp., 591 F.2d 477, 482 n. 7 (8th Cir. 1979) ("Opt-outs . . . are not members of the class and hence are not entitled to the protection of Rule 23(e).").

Accordingly, the Court does not consider Bavishi's objections.[6]

f. Objections of Evans

Evans has submitted numerous objections to the settlement and to the amount of attorneys' fees sought by class counsel. The Court first will address Evans's substantive objections, and thereafter, in discussing class counsel's application for fees, will address Evans's objections to the amount of fees.

i. Damages Analysis

Evans's first objection is that the parties have provided no analysis of the value of the class's claims. Evans contends that the parties "should be able to provide the Court and class members with information on the monetary value of: (a) the class's 'unpaid overtime' claims; (b) the class's 'unreimbursed business-related expenses' claims; (c) the class's 'improper

6. The Court further notes that Bavishi's objections relate to (1) issues that are not the subject of the class claims and (2) Bavishi's misunderstanding of class action litigation procedures, and, consequently, would not require rejection of the settlement even if the Court were to consider such objections.

training error deduction' claims; and (d) the class's claims for 'interest and penalties.' " (*See* Evans Objection at 4:23-5:1.) Evans contends that without such information, the Court cannot make a rational determination as to whether the amount of the settlement is fair, reasonable, and adequate.

At the August 11, 2006 hearing on the parties' motion for preliminary approval of the settlement, the Court noted that because the parties had failed to provide an estimate of the actual losses claimed by the class members, the Court had no way of determining whether the amount of the settlement was acceptable. (*See* New York Attorney General Decl. Ex. 1 at 11:25-12:22.) As the parties note, they have represented to the Court that the settlement constitutes approximately 25 to 35% of the estimated actual loss. (*See id.* at 14:2-3.) At the final fairness hearing, the parties presented a lengthy discussion of the above-referenced estimate, in which they represented that their estimate of the maximum loss to the class was based on hard data obtained from interviews with class members, computer log-in records, and payroll records. The Court is satisfied that the parties had a reasonable factual basis for their estimate that the $45,000,000 settlement represented, at a minimum, 25 to 35% of the loss to the class.

Accordingly, the Court finds the amount of the settlement was fair, reasonable, and adequate, and that the parties' failure to provide a detailed written analysis of the value of the claims does not warrant rejection of the settlement.

ii. Legal Analysis

Evans's next objection is that the parties have failed to "provide a detailed assessment of each theory of liability and the evidence and the law that would support or refute that theory." (*See* Evans Objection at 6:13-15 (internal quotation and citation omitted).) To the extent the parties are required to do so, the Court finds their various memoranda filed with this Court and with Judge Legge, as well as their presentation at the final fairness hearing, adequately set forth a legal and factual analysis of the claims.

iii. Adequacy of Class Representatives

Evans next argues that because each of the named plaintiffs is a former employee of defendants, the named plaintiffs might not be adequate representatives of a class that includes both current and former UBS employees. In particular, Evans notes that the settlement contains no statement as to whether any UBS policies will be changed with respect to class members who are current employees, a matter in which, as Evans observes, former employees have no interest.

Rule 23(a)(4) provides that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to

represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 (1997); *see also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (describing "two criteria for determining the adequacy of representation"; "[f]irst, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class"). As the parties observe, there is no conflict between the named plaintiffs and class members who are current employees of defendants. Both former and current employees are equally interested in obtaining compensation for the assertedly unlawful practices set forth in the complaint. The fact that, in any given case, some of the class members may have potential claims in addition to those raised by the named plaintiffs does not necessarily create a conflict of interest between the named plaintiffs and such class members.

Here, the purpose of the instant settlement is to provide compensation for assertedly unlawful practices occurring during the class period. Notably, the settlement provides for a release only of claims "arising during the Class Members' Released Period," which ends on the date of final approval of the settlement, (*see* Amended Joint Stipulation of Settlement ¶¶ 8, 48-49), and, thus, does not preclude any class member from filing suit against UBS for any future violation of the law. Consequently, if any class member is of the view

that defendants' ongoing policies are unlawful, they remain free to challenge such policies in a future lawsuit.[7]

Accordingly, the Court finds the lack of provision for changes in defendants' policies does not warrant rejection of the settlement.

iv. Allocation of Settlement Fund and Objections to Appointment of Judge Legge as Master

Evans next argues that the parties have not provided an adequate explanation for the allocation of settlement funds among the class members, in particular, the larger distribution to class members who worked in New York, New Jersey, and Pennsylvania as compared with the distribution to class members who worked in other states.

As noted, the Court, at the parties' request, appointed Judge Legge as special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, "to hear and determine whether the allocation formula in the settlement is fair, reasonable and adequate in light of any timely challenges to that allocation." (*See* Order Appointing the Honorable Charles Legge as Master Pursuant to the Stipulation of Parties, filed Dec. 7, 2006.)

---

7. The Court further notes that class counsel, in both their fees motion and at the final hearing, represented that defendants have agreed to implement certain policy changes. (*See* Fees Motion at 2:27-3:15.)

The parties thereafter submitted extensive briefing on the matter to Judge Legge, and Evans filed a supplemental objection raising concerns about the manner in which Judge Legge was appointed as master. (*See* Supplemental Objection of Plaintiff Class Member/ Objector Marty Evans, filed December 21, 2006.)

On January 12, 2007, Judge Legge issued a "Report, Findings and Recommendations of the Master," in which he recommended this Court find "that the procedures for the appointment of the Master substantially complied with the requirements of Rule 53; were fair, adequate and reasonable; and that the Master has been duly appointed under Rule 53 with jurisdiction over the issue referred to him." (*See* Report, Findings, and Recommendations of the Master, filed January 12, 2007, at 3.) Judge Legge further recommended that "[t]he allocation formula . . . be found to be fair, reasonable, and adequate." (*See id.* at 9.)

(1) Objections to Appointment of Judge Legge

Evans stresses that his objection to the appointment of Judge Legge "relates to procedural irregularities surrounding the Order of appointment and has nothing to do with Judge Legge's qualifications to serve as special master." In particular, Evans contends, the order appointing Judge Legge did not comply with all of the requirements of Rule 53. In their motion for final approval, the parties do not address Evans's objections to the order appointing Judge Legge.

Appendix B

As Evans points out, an order appointing a master pursuant to Rule 53 "must state" *inter alia*, (1) "the circumstances—if any—in which the master may communicate ex parte with the court or a party"; (2) "the nature of the materials to be preserved and filed as the record of the master's activities"; and (3) "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." *See* Fed. R. Civ. P. 53(b)(2). Although Evans correctly observes that the proposed order submitted by the parties and signed by Court fails to expressly set forth all of the above-referenced information, the Court, for the following reasons, agrees with Judge Legge that the order is in substantial compliance with Rule 53(b)(2). First, the Court has not communicated ex parte with Judge Legge, nor is it aware of any ex parte communications between Judge Legge and any party. Moreover, the Court is confident that Judge Legge, as a former federal judge, is well aware of the need to avoid ex parte communications absent specific authorization. Second, the order authorizes Judge Legge to "preserve any . . . testimony or evidence"; all materials submitted to Judge Legge, as well as the transcript of the hearing before him, have been made part of the record in the instant action. Third, the order expressly provides that the Court could "adopt Judge Legge's findings or revisit them at the January 19, 2007 hearing," (*see* Stipulated Appointment Order at 2:22-23), and thus establishes the time limits and procedure by which the Court would review Judge Legge's findings. Although the order does not expressly set forth the applicable standards for

review of Judge Legge's findings, those standards are provided in Rule 53 itself. Because the parties did not stipulate that Judge Legge's findings of fact would be either "reviewed for clear error" or "final," the Court must review any such findings of fact de novo. *See* Fed. R. Civ. P. 53(g)(3). The Court also must review de novo all findings of law. *See* Fed. R. Civ. P. 53(g)(4). The Court may set aside any ruling on "a procedural matter only for an abuse of discretion." *See* Fed. R. Civ. P. 53(g)(5).

Evans further objects that he was not given an opportunity to be heard prior to the Court's appointment of Judge Legge as master. Rule 53(b)(1) requires a court to "give the parties notice and an opportunity to be heard before appointing a master"; Rule 53(a)(1) permits a court to appoint a master only to "perform duties consented to by the parties." *See* Fed. R. Civ. P. 53(a)(1), (b)(1). Here, plaintiffs and defendants expressly consented to the appointment of Judge Legge. Evans cites no authority requiring class counsel to obtain the consent of all members of the class prior to agreeing to the appointment of a master.

Finally, Evans notes that Rule 53 permits any party to file objections to a master's findings and that, accordingly, he and the other objectors to the settlement should be permitted to file objections to Judge Legge's findings. In particular, Rule 53(g)(2) provides that any "party may file objections to-or a motion to adopt or modify—the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are

served, unless the court sets a different time." *See* Fed.R.Civ.P. 53(g)(2). Assuming, *arguendo,* the individual class members have such a right separate from class counsel, here, the Court did "set[ ] a different time," by providing that Judge Legge's findings could be "revisit [ed]" at the January 19, 2007 fairness hearing. To date, no objections to Judge Legge's findings have been filed, and none were raised at the final fairness hearing.

Accordingly, the Court finds Evans's procedural objections to the order appointing Judge Legge provide no basis for rejecting the proposed settlement.

(2) Objections to Allocation of Settlement Fund

Evans objects that the parties have not provided the Court with "specific information on how the formula for allotting settlement benefits was developed"; in particular, Evans contends, the increased payout for class members who worked in New York, New Jersey, and Pennsylvania appears to be based on speculation.

Subsequent to the date of Evans's objections, the parties filed detailed briefing on this issue with Judge Legge, explaining that although the value of the class overtime claims is fairly consistent throughout all jurisdictions (with the exception of California), the value of the unlawful deductions claims differs significantly between two groups of states. In the first group, which defendant describes as the "freedom to contract states"

and which include the "vast majority" of the jurisdictions at issue in the instant settlement, courts "typically sustain reimbursement agreements between employers and employees, contracts defining wages, and/or contracts permitting wage deductions." (*See* Defendants' memorandum to Judge Legge at 6:23-7:3.) According to defendants, their liability in "freedom to contract" states is "non-existent or less than its exposure in other states." (*See id.* at 7:12-13.) In the second group, consisting of New York, New Jersey, and Pennsylvania, the law, according to defendants, is not as clear with respect to the propriety of the deductions at issue. Accordingly, "[t]o account for the parties' greater uncertainty regarding the likely outcome of Class Member's deductions in these three states, [the parties] agreed to allocate a larger portion of the Settlement proceeds to Class Members in New York, New Jersey, and Pennsylvania." (*See id.* at 7:25-8:3.)

Judge Legge, in his January 12, 2007 Report, concluded that the allocation formula is fair, reasonable, and adequate. Having reviewed de novo the memoranda submitted to Judge Legge, as well as the transcript of the January 4, 2007 hearing before Judge Legge, the Court agrees that the parties have set forth a reasoned basis for treating claimants employed in New York, New Jersey, and Pennsylvania differently from claimants employed in other jurisdictions.

Accordingly, the Court finds Evans's objections to the allocation formula do not warrant rejection of the settlement.

Appendix B

v. Separate Settlements in *Bowman* and *Glass*

Evans next argues that the parties have failed to adequately explain why *Bowman* and *Glass* were filed as separate actions and, consequently, why California employees are not part of the *Glass* settlement. As discussed above, *Bowman* and *Glass* were filed at separate times by separate counsel. Moreover, *Bowman* was filed and settled prior to the filing of any of the actions that ultimately were consolidated in *Glass*.

Accordingly, this objection does not warrant rejection of the instant settlement.

vi. Claims Administration

Evans's next objection is that the settlement grants the claims administrator the final word in resolving disputes over claims to the settlement fund. In particular, the settlement provides that the claims administrator "will perform the duties of . . . notifying the Parties of and resolving any disputes regarding claims by the Class Members." (*See* Amended Joint Stipulation of Settlement at 3 ¶ 3.) Evans contends the settlement should be amended to grant the class members the right to petition the Court in the event of a dispute as to the manner in which a claim is resolved by the claims administrator.

The parties, in response, argue that the resolution of claims disputes is not complex, and that Rust

Consulting, Inc. ("Rust"), the claims administrator, is an experienced neutral evaluator who is capable of reaching a fair resolution. Consequently, the parties argue, adding court review to the process "would delay the Settlement for no ascertainable purpose." (*See* Motion at 17:12-25.)[8] Evans has submitted no evidence calling into question Rust's ability to resolve in a fair manner disputes as to claims, and has submitted no authority requiring the Court to resolve any such disputes.

Accordingly, this objection does not warrant rejection of the settlement.[9]

---

8. David Holland ("Holland"), Principal Consultant for Rust Consulting, Inc., attests that as of January 4, 2007, he has received 482 claim forms that dispute the employment history provided to class members on their claim forms. (*See* Holland Decl. ¶ 20.) The settlement provides that any such disputes shall be resolved by the claims administrator if the parties are unable to reach an agreement as to their resolution. (*See* Amended Joint Stipulation of Settlement ¶ 44.)

9. Evans also objects that, although the Settlement provides for a reasonable payment for the services of the claims administrator, no information about such cost has been provided. Holland has since attested, in his declaration filed January 4, 2007, that "[t]he total estimated cost for the administration of this Settlement, including fees incurred and future costs for completion of the administration, is $182,847.90." (*See* Holland Decl. ¶ 24.)

vii. Joseph Glass NASD Arbitration

Evans's final objection to the settlement is that the parties have provided no information about named plaintiff Joseph Glass's claims in NASD arbitration No. 04-04995. Evans contends such information is "needed to ensure that there is nothing about . . . Glass's NASD claims that would affect his ability to adequately represent the class." (*See* Evans Objections at 11:12-17.) In response, the parties represent that Glass's arbitration "does not encompass any overtime or wage deduction claims and is entirely irrelevant to th[e] Settlement." (*See* Joint Motion at 15 n. 11.) At the final fairness hearing, the parties informed the Court that the subject of the NASD arbitration was race and age discrimination. No evidence has been presented to the contrary.

Accordingly, this objection does not warrant rejection of the settlement.

g. Conclusion

For the reasons set forth above, the Court finds the proposed settlement is fair, reasonable, and adequate, and will GRANT the parties' joint motion for approval thereof.

Appendix B

B. Motion for Attorneys' Fees, Costs and Class Representative Enhancements

Class counsel moves for an award of fees and costs in the amount of $11,250,000, as well as a $25,000 payment to each of the four named plaintiffs. As noted, the settlement provides for a maximum payment of "up to $11,250,000.00 in attorney' fees and litigation costs to Class Counsel, subject to Court approval" as well as "a pool of up to $100,000.00 in enhancements to be divided among the Class Representatives, subject to Court approval." (*See* Amended Joint Stipulation of Settlement ¶ 29(a).)

1. Fees and Costs

a. Legal Standard

"Under the 'common fund' doctrine, 'a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.' " *See Staton*, 327 F.3d at 967 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980)). " 'The doctrine rests on the presumption that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.' " *Id.* (quoting *Boeing*, 444 U.S. at 478). Under the common fund doctrine, the Court may assess "attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.' " *See id.* (quoting *Boeing*, 444 U.S. at 478).

Appendix B

Under the common fund doctrine, the Court may award fees by using either the percentage-of-the fund method or the lodestar method, and "no presumption in favor of either the percentage or the lodestar method encumbers the district court's discretion to choose one or the other." *See In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1296 (9th Cir.1994). "As always, when determining attorneys' fees, the district court should be guided by the fundamental principle that fee awards out of common funds be ' *reasonable under the circumstances.*' " *Id.* (quoting *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (emphasis in original)).

The Ninth Circuit has repeatedly held that 25% of the gross settlement amount is the benchmark for attorneys' fees awarded under the percentage method and that if the Court departs from that benchmark, the record must indicate the Court's reasons for doing so. *See, e.g., Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir.2000). "The benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

b. Discussion

Class members Cintron and Evans, as well as the New York Attorney General, have filed objections to the amount of attorneys' fees and costs sought by class counsel. Cintron objects that the amount of attorneys' fees and costs sought "is disproportionate and ridiculous." (*See* Cintron Objection at 1.) The New York Attorney General argues that the fees sought are "unreasonable" in light of "the minimal work required from plaintiffs' counsel and the insignificant risk of non-recovery which they ran," and suggests that, under the circumstances, an award based on the lodestar would be more appropriate. (*See* Amicus Curiae Memorandum of New York Attorney General at 15-16.) Evans contends the Court should conduct a "lodestar cross-check" against class counsel's request for $11,250,000 in fees and costs.[10] (*See* Evans Objection at 12.)

The Ninth Circuit has held that the Court may, but is not required to, compare the lodestar and the 25% benchmark to determine if the 25% benchmark results in an inappropriately high or low fee. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th Cir.2002) (observing that calculation of lodestar provides check on reasonableness of percentage award; affirming

10. Evans's additional objection, that class counsel has not documented the actual costs incurred, has been addressed by the declaration of class counsel, filed January 5, 2007, attesting that class counsel have incurred actual expenses in the total amount of $56,924.07, and providing a summary thereof. (*See* McInerney Decl. ¶ 19 and Ex. F.)

district court's conclusion that fee award of 28% of fund and 3.65 times lodestar amount was reasonable); *Fischel v. Equitable Life Assurance Society of the United States*, 307 F.3d at 1001, 1007 (9th Cir. 2002) (finding no error where district court awarded fees under lodestar method and failed to compare lodestar with 25% benchmark).

In the instant action, although class counsel has not provided the Court with information from which the Court could calculate the lodestar, there can be no doubt that the lodestar would result in a fee substantially lower than the $11,250,000 claimed. The dockets for the three cases that ultimately were consolidated in the *Glass* action show no litigation activity of substance other than the filing of the complaints. (*See* New York Attorney General Decl. E's. 10, 12, 17.) Additionally, because the instant settlement was reached prior to the filing of the *Glass* action, in which those three cases were consolidated, there was no litigation in this Court prior to settlement. Since that time, however, a considerable number of filings on behalf of the plaintiff class have been made and, of course, those filings do not necessarily reflect all the hours spent by class counsel out of court. Nevertheless, the Court would not expect those out-of-court hours to affect the lodestar to the extent of producing a fee as high as that claimed herein under the percentage method.

The early settlement of the instant action resulted in significant benefit to the class, however. In light of the recent Opinion Letter of the Department of Labor,

issued November 27, 2006, defendants likely would not agree to as large a settlement, or, indeed, any settlement, if the parties were attempting to negotiate a settlement today. Class counsel expressly recognized the negative impact an opinion letter could have on the instant litigation well before the November 27, 2006 Opinion Letter was issued. (*See, e.g.*, Plaintiff's Opposition to Lawrence R. Kaufmann's Motion to Intervene, filed Oct. 27, 2006, at 3-4 (noting "[t]he whole idea that stockbrokers can recover for improper wage deductions or sue for overtime is clearly a novel one . . . [and] a new opinion letter could end this genre as quickly as it did a few years ago when the Department of Labor wrote that insurance adjusters were exempt from overtime").) Class counsel achieved an excellent result for the class members by settling the instant action promptly.

Although the Ninth Circuit has noted that where an action is settled quickly after the action is filed, "the lodestar calculation may convince a court that a lower percentage [than the 25% benchmark] is reasonable," it also has explained that it did "not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly." *See Vizcaino*, 290 F.3d at 1050 and n. 5. Indeed, as the Ninth Circuit has observed, "it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *See id.* at 1050 n. 5.

Moreover, the Ninth Circuit has held the "relevant circumstances" that could justify an *upward* departure from the 25 percent benchmark include the achievement of "exceptional results" for the class. *See Vizcaino*, 290 F.3d at 1048 (affirming fee award of 28 percent of settlement fund). Under the circumstances presented here, where the early settlement resulted in a significant benefit to the class, the Court finds no need to conduct a lodestar cross-check.[11] Class counsel's prompt action in negotiating a settlement while the state of the law remained uncertain should be fully rewarded.

The New York Attorney General and Evans further argue that even if fees are awarded under the percentage method, the Court should base such fees on the amount of the settlement fund actually claimed by the class. The Ninth Circuit has held, however, that the district court must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis of the amount of the fund actually claimed by the class. *See Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Contrary to Evans' argument, the Court finds inapplicable the Class Action Fairness Act's provision that "any attorney's fee award to class counsel that is attributable to the award of . . . coupons shall be based on the value to

11. Consequently, the Court also rejects Evans's argument that because the class notice states defendants will not challenge the amount of fees sought by class counsel, (*see* Class Notice at 5 ¶ J), the Court must permit Evans to review class counsel's time records.

class members of the coupons that are redeemed." *See* 28 U.S.C. § 1712(a). That statute, on its face, does not apply to non-coupon settlements.

Accordingly, the Court finds the benchmark of 25% of the settlement is reasonable under the circumstances presented herein.

2. Enhancements

Class counsel requests that the Court award a $25,000 enhancement to each of the four class representatives for their assistance in the instant litigation. As noted, the settlement provides for "a pool of up to $100,000.00 in enhancements to be divided among the Class Representatives, subject to Court approval." (*See* Amended Joint Stipulation of Settlement ¶ 29(a).)

Evans objects to payment of such enhancements, relying on a statement in the Committee Report on the Private Securities Litigation Act of 1995 ("PSLRA") that "lead plaintiffs are not entitled to a bounty for their service." (*See id.; see also* 15 U.S.C. § 78u-4(a)(4) ("The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class.").) The instant action is not an action brought pursuant to the PSLRA, however, and, consequently, is not subject to the PSLRA's ban on enhancements to lead plaintiffs. Where the PSLRA does

not apply, the issue of "[w]hether to award [a lead plaintiff] for his efforts is within the Court's discretion." *See Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294 (N.D.Cal.1995).

Evans further objects that the payments sought are "excessive" and that such payments "should be based on declarations filed by each proposed recipient, describing the services he performed on behalf of the class." (*See* Evans Objection at 21.) Class counsel has filed a declaration attesting that the named plaintiffs "provided a great deal of informal discovery to Class Counsel and a great deal of insight into the policies and practices of UBS," (*see* McInerney Decl. ¶ 20), and provided additional relevant detail at the final fairness hearing. Class counsel further attests that "these four individuals, all of whom are still currently employed in the securities industry, placed something at risk by putting their names on a complaint against one of the largest brokerage houses in America." (*See id.*) The Court finds such representations, although not as detailed a showing as Evans asserts is necessary, are sufficient to support approval of the requested enhancements.

Accordingly, the Court finds the requested payment of $25,000 to each of the named plaintiffs is appropriate.

Appendix B

CONCLUSION

For the reasons set forth above,

1. The parties' joint motion for final approval of settlement is hereby GRANTED.

2. Class counsel's application for attorney's fees, costs, and class representative enhancements is hereby GRANTED.

IT IS SO ORDERED.

Dated: January 26, 2007

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX C — ORDER DENYING ANTHONY D'ARIA'S MOTION TO INTERVENE; VACATING HEARING OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 17, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER DENYING ANTHONY D'ARIA'S MOTION TO INTERVENE; VACATING HEARING

(Docket No. 130)

Before the Court is class member Anthony D'Aria's ("D'Aria") motion, filed December 15, 2006, to intervene in the instant action, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. Plaintiffs and defendants have filed separate oppositions to the motion; D'Aria has filed a reply, and, with the Court's

permission, plaintiffs and defendants have filed separate surreplies. Having considered the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for decision without oral argument, *see* Civil L.R. 7-1(b), hereby VACATES the January 19, 2006 hearing on the motion, and rules as follows.

BACKGROUND

The instant class action is asserted on behalf of a class consisting of all persons who, at any time during the applicable statute of limitations, are or were employed as stockbrokers at any of the brokerage offices of UBS Financial Services Inc. or its predecessors, UBS Paine Webber and Paine Webber Group Inc., anywhere in the United States or its territories, excluding California. (*See* Compl. ¶ 1.) On July 28, 2006, the parties filed a joint motion for preliminary approval of a proposed settlement. On August 25, 2006, the Court granted preliminary approval of the settlement and set a fairness hearing for January 19, 2007. Pursuant to the Class Notice, any request to opt out of the settlement and any objections to the settlement were required to be submitted no later than November 14, 2006. (*See* Class Notice at 7 ¶¶ C and D.)

On October 13, 2006, class member Lawrence Kaufmann ("Kaufmann") filed a motion to intervene in the instant action for purposes of obtaining an order rejecting the proposed settlement, consolidating the instant action with *Bowman v. UBS*, C-04-3525 MMC, discharging current counsel for the *Bowman* and *Glass*

plaintiffs, and appointing Kaufmann's counsel to represent the *Bowman* and *Glass* classes. On November 14, 2006, Kaufmann withdrew his motion to intervene.

On November 16, 2006, the Court issued an order in which the Court noted Kaufmann's motion contained objections to the proposed settlement, and invited the parties to file memoranda addressing whether Kaufmann should be permitted to withdraw his objections pursuant to Rule 23(e)(4)(B) of the Federal Rules of Civil Procedure.

D'Aria did not file a timely objection to the settlement. Nonetheless, on November 16, 2006, D'Aria filed a motion to substitute himself for Kaufmann and to adopt Kaufmann's motion to intervene. That same date, the Court issued an order denying D'Aria's motion.

On November 17, 2006, the Court held a fairness hearing in the *Bowman* action and granted final approval of the *Bowman* settlement.

On December 1, 2006, plaintiff, defendants, and D'Aria filed memoranda addressing whether the Court should permit Kaufmann to withdraw his objections to the proposed settlement. Thereafter, plaintiffs and defendants filed separate motions to strike D'Aria's memorandum; by separate order filed concurrently herewith, the Court has granted those motions.

On December 15, 2006, D'Aria filed the instant motion to intervene in the *Glass* action.

Appendix C

DISCUSSION

D'Aria seeks leave to intervene as a matter of right, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure; he does not seek to intervene permissively, pursuant to Rule 24(b). D'Aria contends his interests and the interests of the class have not been adequately represented by plaintiffs and their counsel; he seeks to intervene for the purposes of (1) objecting to the proposed settlement; (2) replacing plaintiffs' counsel with his own counsel or, alternatively, appointing his own counsel as co-counsel with plaintiffs' current counsel; (3) obtaining discovery as to "the circumstances under which the *Glass* action was prosecuted and settled" and the circumstances under which Kaufmann withdrew his objection and motion to intervene; and (4) litigating the action to trial or attempting to negotiate a new settlement.

A. Intervention As Matter Of Right

"Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *See* Fed. R. Civ. P. 24(a). Where, as here, the applicant

seeks to intervene as of right, and in the absence of a federal statute conferring an unconditional right to intervene, the applicant must "demonstrate that (1)[he] has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect [his] interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *See United States v. Alisal Water Corporation*, 370 F.3d 915, 919 (9th Cir. 2004) (internal quotation and citation omitted). "The party seeking to intervene bears the burden of showing that *all* the requirements for intervention have been met." *Id.* (emphasis in original).

1. Significant Protectable Interest Related to Subject of Action

"An applicant for intervention has a significantly protectable interest if the interest is protected by law and there is a relationship between the legally protected interest and the plaintiff's claims." *See Alisal*, 370 F.3d at 919. "An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant." *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998).

As D'Aria is a member of the *Glass* class, he has a significant protectable interest relating to the subject of the instant action. *See, e.g., In re Community Bank of Northern Virginia Mortgage Loan Litigation*, 418 F.3d 277, 314 (3d Cir.2005) (finding when unnamed class

member seeks to intervene in class action, significant protectable interest factor "is satisfied by the very nature of class action litigation"). No argument to the contrary has been submitted.

Accordingly, the Court finds D'Aria has demonstrated a significant protectable interest in the instant litigation.

2. Impairment of Applicant's Ability to Protect His Interest

The next issue is whether "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect [his] interest." *See Alisal*, 370 F.3d at 919.

Defendants argue that D'Aria's interests will not be impaired as a result of the instant settlement because D'Aria was free to opt out of the settlement and to assert, by means of a separate action, any claims he wished to pursue against defendants. *See, e.g., Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343, 1346 (9th Cir. 1977). In *Hawaii-Pacific*, the Ninth Circuit affirmed the district court's denial of a motion to intervene because, *inter alia*, the moving class members, who had not received notice of the settlement and arguably were not bound thereby, could "pursue[ ] their individual claims in independent actions" and thus did not "sustain[ ] their burden of proving impairment or impediment to their ability to protect their interest." *See id.*

Here, however, D'Aria received timely notice of the proposed settlement, D'Aria has not opted out, and the November 14, 2006 deadline to opt out of the settlement has passed. Because D'Aria has not opted out of the class settlement, and the deadline to do so has passed, the Court finds D'Aria has demonstrated the disposition of the instant action may impair or impede his ability to protect his interest in the claims constituting the subject of the instant litigation.[1]

3. Timeliness

The third factor, as noted, is whether the motion to intervene is timely. *See Alisal*, 370 F.3d at 919. Timeliness "is a flexible concept"; "[a]lthough delay can strongly weigh against intervention, the mere lapse of

---

1. Moreover, as D'Aria observes, the Ninth Circuit has stated, albeit in a footnote, that where a motion to intervene is timely, a class member "should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court," thus suggesting that members of a class, by their very nature, meet the first two requirements for intervention as a matter of right. *See Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401, 1405 n. 1 (9th Cir. 1989) (internal quotation and citation omitted); *see also Community Bank*, 418 F.3d at 314 (holding when class members "seek intervention as a matter of right, the gravamen of a court's analysis must be on the timeliness of the motion to intervene and on the adequacy of representation," because the "interest" and "impairment" requirements of Rule 24(a)(2) "are satisfied by the very nature of Rule 23 representative litigation"). The Court considers the question of timeliness *infra*.

time, without more, is not necessarily a bar to intervention." *See id.* at 921. Generally, in determining whether a motion to intervene is timely, courts weigh the following factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reason for and length of the delay." *See id.* Where a proposed intervenor seeks to intervene for purposes of objecting to a proposed settlement, timeliness generally is measured from the date the proposed intervenor received notice that the proposed settlement was contrary to its interest. *See United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) (finding motion to intervene timely where proposed intervenors "acted as soon as they had notice that the proposed settlement was contrary to their interests"); *see also Community Bank*, 418 F.3d at 314 (finding motion to intervene "presumptively timely" where filed before deadline to opt out of class settlement).

Here, notice of the proposed settlement was mailed to class members on September 15, 2006. (*See* Holland Decl. ¶ 7.) On September 22, 2006, D'Aria signed a "Consent to Join Settlement" form, by which he "consent[ed] to be a party plaintiff" in the instant action and "authorize[d] Class Counsel to act on his . . . behalf in all matters relating to this action, including the settlement of his . . . claims"; he also submitted a claim form, seeking his share of the settlement proceeds. (*See* McInerney Decl. Exs. 1 and 2.) D'Aria attests that "beginning in early to mid-September, 2006, and continuing in October, 2006," he had discussions with

his counsel about the instant action and the proposed settlement. (*See* D'Aria Decl. ¶ 3.) Although D'Aria thus concedes he was notified of the proposed settlement and discussed it with counsel, he nonetheless failed to file an objection to the settlement prior to the November 14, 2006 deadline. The instant motion to intervene was filed December 15, 2006, more than a month after the deadline for class members to opt out of the settlement.

a. First Factor

The first factor in the timeliness analysis is "the stage of the proceeding at which an applicant seeks to intervene." *See Alisal,* 370 F.3d at 921. The Ninth Circuit has held that a proposed intervenor is not necessarily untimely merely because the motion to intervene is filed after a significant amount of time and effort has been expended in accomplishing a settlement. *See Carpenter,* 298 F.3d at 1125 (holding motion to intervene timely where proposed intervenors filed "as soon as they had notice" of settlement's terms).

Here, however, D'Aria concedes he received timely notice of the proposed settlement yet failed to file a timely objection thereto. Rather, as noted, he submitted, on September 22, 2006, a "Consent to Join Settlement" form, as well as a claim for his share of the settlement proceeds. (*See* McInerney Decl. Exs. 1 and 2.) Indeed, after receiving notice of the settlement, D'Aria waited nearly three months before moving to intervene, until the last possible date, resulting in his motion being heard on the same date as the final fairness hearing.

Appendix C

The primary purpose of the Court's setting a deadline for class members to file objections to a proposed settlement is to avoid the disruption caused by motions such as the instant motion to intervene. Accordingly, the Court finds the stage of the proceedings at which D'Aria seeks to intervene weighs against a finding of timeliness.

b. Second Factor

As noted, the second factor in the timeliness analysis is "the prejudice to the other parties." *See Alisal*, 370 F.3d at 921. Here, as plaintiffs correctly point out, D'Aria's intervention and the subsequent reopening of the litigation "could be disastrous to the [class member] brokers," because a recently issued Opinion Letter by the Department of Labor casts significant doubt on the strength of their claims. (*See* Plaintiffs' Opp. at 15.)

Plaintiffs in the instant action seek recovery of overtime pay and assertedly improper wage deductions on behalf of a class of stockbrokers, under the federal Fair Labor Standards Act ("FLSA") and state law. The FLSA contains various exceptions to its requirement that employers pay their employees time and a half for work in excess of 40 hours per week, including, in particular, an exemption for "any employee employed in a bona fide . . . administrative . . . capacity." *See In re Farmers Insurance Exchange*, 466 F.3d 853, 858-59 (9th Cir. 2006); *see also* 29 U.S.C. § 213(a)(1). On November 27, 2006, months after the proposed *Glass* settlement was negotiated, the Department of Labor issued an

Appendix C

Opinion Letter stating stockbrokers meet the requirements of the "administrative exemption" to the FLSA and, thus, are not entitled to overtime under the FLSA. (*See* McInerney Decl. Ex. 9 at 8.) Courts "must give deference to the DOL's interpretation of its own regulations through, for example, Opinion Letters." *See Farmers*, 466 F.3d at 860.

As a result of the issuance of the November 27, 2006 Opinion Letter, plaintiffs' federal overtime claims are significantly weakened. It is likely that plaintiffs' state law overtime claims will be similarly impacted. *See, e.g., Franklin v. Breton Int'l, Inc.*, 2006 WL 3591949 at *4 (S.D.N.Y.2006) (holding that because plaintiff therein was "an exempt employee under the FLSA, he [was] also exempt under the overtime requirements of the New York" law).

Consequently, if the motion to intervene were granted, plaintiffs and the other class members are likely to be significantly prejudiced by having to either litigate their overtime claims, or attempt to negotiate a new settlement thereof, in the context of the Department of Labor's recent Opinion Letter.

Accordingly, the Court finds the prejudice resulting to other class members if D'Aria were permitted to intervene weighs against a finding that D'Aria's motion to intervene is timely.

c. Third Factor

The Court next turns to the third factor in the timeliness analysis, "the reason for and length of the delay." *See Alisal*, 370 F.3d at 921.

D'Aria submits no evidence with respect to the reason he did not seek to intervene before the deadline had passed for class members to object to the proposed settlement. D'Aria attests only that when he learned Kaufmann had withdrawn, he authorized counsel "to challenge the adequacy of the settlements on [D'Aria's] behalf and to put him forward in place of" Kaufmann. (*See* D'Aria Decl. ¶ 4.) In his motion to intervene, D'Aria argues that UBS and Kaufmann deliberately delayed providing notification of Kaufmann's withdrawal of his motion to intervene until it was too late for other class members to file their own objections to the proposed settlement. D'Aria relies on Kaufmann's declaration, in which Kaufmann states he reached a settlement with UBS on November 7, 2006, a week before Kaufmann provided notice to the Court of such settlement. (*See* Kaufmann Decl., filed November 15, 2006, ¶ 5.) There is no evidence, however, that UBS conspired with Kaufmann to delay announcement of Kaufmann's withdrawal of his motion.

Moreover, D'Aria submits no evidence that he relied on Kaufmann to object on his behalf, or that he would have filed his own objection had Kaufmann not moved to intervene. In any event, nothing precluded D'Aria from filing his own timely objection to the proposed

settlement. Indeed, other class members filed timely objections. Accordingly, the Court finds D'Aria has failed to provide adequate justification for his delay in seeking to intervene.

With respect to the length of the delay, as noted, D'Aria delayed for nearly three months after receiving notice of the settlement, as well as close to a month after the deadline for class members to object to the proposed settlement had passed. "A class member must intervene when he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation." *Alisal*, 370 F.3d at 923.

Here, D'Aria knew of the settlement, consulted with counsel, and nonetheless failed to object to the settlement in a timely manner. The Class Notice clearly set forth November 14, 2006 as the deadline for submission of objections to the settlement, and expressly provided that any class member who failed to object in the manner set forth in the Class Notice would be "deemed to have waived any objections and [would] be foreclosed from making any objection." (*See* Class Notice at 7 ¶ C.) D'Aria thus was aware that by failing to object in a timely manner, he was forgoing an opportunity to object to the settlement. D'Aria has offered no adequate support for an order permitting him to evade that deadline by submitting untimely objections to the settlement in the form of a motion to intervene.

Accordingly, the Court finds "the reason for and length of the delay" in seeking intervention weighs against a finding of timeliness.

d. Conclusion

For the reasons set forth above, the Court finds D'Aria's motion to intervene is untimely and, consequently, that D'Aria has not shown he is entitled to intervene as a matter of right. *See Alisal*, 370 F.3d at 919 (holding "party seeking to intervene bears the burden of showing that *all* the requirements for intervention have been met") (emphasis in original).

4. Adequacy of Representation

Although D'Aria's motion for intervention as a matter of right fails because he has not demonstrated such motion is timely, the Court nonetheless will continue its analysis of the four-factor test.

The fourth and final factor is whether "the existing parties may not adequately represent the applicant's interest." *See Alisal*, 370 F.3d at 919. In determining adequacy of representation, the Court considers three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

"The most important factor in determining the adequacy of representation is how the interest compares with the interest of existing parties." *Id.* "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.* "If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." *Id.*

Here, D'Aria and the named *Glass* plaintiffs have the same ultimate objective: obtaining compensation for assertedly unpaid overtime and improper wage deductions. Indeed, D'Aria, in his proposed complaint-in-intervention, expressly adopts "all of the allegations of plaintiffs' complaint in this action except those that relate to the adequacy of the putative class representatives," and alleges no additional substantive causes of action against defendants. (*See* Proposed Complaint in Intervention ¶ 3.) Thus, D'Aria must make a "compelling showing" of inadequate representation. *See Arakaki*, 324 F.3d at 1086; *see also League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir.1997) ("When a proposed intervenor has not alleged any substantive disagreement between it and the existing parties to the suit, and instead has vested its claim for intervention entirely upon a disagreement over litigation strategy or legal tactics, courts have been hesitant to accord the applicant full-party status.").

D'Aria argues class counsel is inadequate for the following reasons: (1) the dollar amount of the settlement

is too low compared to the actual damages suffered by the class; (2) each class member in the instant action will receive significantly less than the recovery per class member in *Bowman;* (3) the instant action was settled without any formal discovery, expert analysis, or other formal litigation activity; (4) the attorneys' fees negotiated are too high compared to the time and effort expended; (5) the settlement was negotiated as a "claims made" settlement under which all unclaimed settlement funds and any portion of the claimed attorneys' fees that are not approved by the Court will revert to UBS; and (6) proper notice was not provided to the class. (*See* Motion at 2-3.) In essence, D'Aria complains that the amount of the settlement is too small, the amount of attorneys' fees sought is too large, and the circulation of the notice was too narrow.

In asserting the amount of the settlement is inadequate, D'Aria sets forth no analysis with respect to the likelihood of success on the merits of the class claims if such claims were tried rather than settled. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998) (providing district court must consider, *inter alia,* "the strength of the plaintiffs' case" in determining whether a settlement is fair, reasonable, and adequate). Although D'Aria contends the *Glass* plaintiffs suffered between $240 million and $880 million in unpaid overtime,[2] he provides no analysis of the

2. The parties estimate the losses at approximately $128 million to $180 million. (*See* New York Attorney General Decl. Ex. 1 (Transcript of Aug. 11, 2006 preliminary approval hearing) at 13:1-14:5.)

applicability to the class members of the FLSA's administrative exemption. As discussed above, the Department of Labor recently issued an Opinion Letter stating the administrative exemption applies to stockbrokers and, consequently, that stockbrokers are not entitled to overtime pay under the FLSA. Because the reasonableness of the settlement depends not only on the claimed amount of damages, but also on a showing of the strength of the plaintiffs' case, and D'Aria fails to provide any analysis on the latter point, his computation of damages fails to provide adequate support for a finding that the amount of the settlement is inadequate.[3]

D'Aria's next contention is that the amount of the settlement is too low when compared with the settlement in *Bowman*. There is no evidence, however, that the *Bowman* and *Glass* settlements constitute parts of a single settlement, let alone a single settlement pursuant to which settlements funds were allocated to the *Bowman* class at the expense of the *Glass* class members. As the Court noted at the *Bowman* fairness hearing, the *Bowman* action was settled prior to the filing of any of the actions that ultimately were consolidated in the *Glass* action, and the amount of the

3. D'Aria's contention that plaintiffs' counsel did too little to prepare for settlement negotiations adds no further support in the absence of a showing that the settlement amount is inadequate. Consequently, the Court denies as moot defendants' motion, filed January 11, 2007, to strike the supplemental declaration of John Halebian as conclusory, in that the opinions challenged thereby concern the subject of adequate preparation.

Bowman settlement was unaffected in any way by the later settlement negotiations in the *Glass* action. (*See* McInerney Decl. Ex. 3 (Transcript of Nov. 17, 2006 *Bowman* fairness hearing) at 12:6-24.)

Moreover, D'Aria fails to set forth any independent analysis of the *Glass* class members' likelihood of success on the merits of their claims as compared to that of the *Bowman* plaintiffs. Rather, D'Aria relies entirely on the analysis set forth in the amicus brief submitted by the Attorney General of the State of New York, in which the Attorney General compared the California law applicable to the *Bowman* plaintiffs with the New York law applicable to the New York class members in the instant action. When UBS filed a detailed response to the amicus brief, explaining the differences between the two states' laws, the Attorney General filed a reply conceding California's overtime laws are significantly more favorable to plaintiffs than New York's overtime laws. D'Aria presents no argument to the contrary.

In arguing the amount of attorneys' fees negotiated reflects inadequate representation, D'Aria fails to recognize that the Ninth Circuit has held 25% of the gross settlement amount to be the benchmark for attorneys' fees awarded under the percentage method. *See, e.g., Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000). Here, the settlement provides for a maximum fee of $11,250,000, which is 25% of the $45 million settlement amount. (*See* Amended Joint Stipulation of Settlement ¶ 29(a).) Moreover, the Ninth Circuit has held that where, as here, the settlement provides that

unclaimed settlement funds revert to the defendant, the district court must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis of the amount of the fund actually claimed by the class. *See Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Consequently, D'Aria has failed to show counsel's claim for a 25% fee award indicates either some impropriety or inadequacy in counsel's representation.[4]

The Court likewise finds unpersuasive D'Aria's contention that plaintiffs' counsel inadequately represented the class by agreeing to a settlement under which any unclaimed settlement funds, or the amount by which attorneys' fees are reduced, will revert to UBS. D'Aria cites no authority holding improper a settlement providing for such reversion of unclaimed or unawarded funds; indeed, there is authority suggesting to the contrary. *See, e.g., Williams*, 129 F.3d at 1027 (discussing class action settlement without expressing concern as to provision for reversion of unclaimed funds to defendant); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 816 (5th Cir. 1989) (approving settlement containing provision that unclaimed funds under consent decree would be divided between plaintiffs' counsel and defendant); Herbert Newberg & Alba Conte, 3 Newberg on Class Actions §§ 10:15, 10:17 (4th ed.2002) (citing cases).[5]

---

4. The Court, of course, ultimately will determine whether the amount claimed should be awarded.

5. *See also Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (holding unclaimed (Cont'd)

Finally, with respect to notice, D'Aria argues that plaintiffs' counsel "failed to give proper notice to the class by misrepresenting the nature and amount of the proposed settlement, limiting actual notice solely to the last known address of class members, and failing to publish any notice in a widely circulated financial publication likely to be seen by class members." (*See* Motion to Intervene at 3:19-22.) D'Aria does not identify the asserted misrepresentations, and the Court is aware of none. Nor does D'Aria submit evidence supporting his assertion as to the use of addresses. By contrast, plaintiffs' counsel attests "notice was not limited to the last known address of class members; instead, the claims administrator did address updated searches and re-mails." (*See* McInerney Decl. ¶ 14; *see also* Holland Decl. ¶¶ 8-9.) Finally, plaintiffs' counsel attests he "took out a full page advertisement in the Registered Rep," which, he further attests, is a "monthly national publication subscribed to by a large number of brokerage houses, branches and brokers themselves." (*See id.* ¶ 15 and Ex. 10.) D'Aria submits no evidence to the contrary. Consequently, D'Aria has not shown the notice provided to the class was inadequate.

(Cont'd)
amount of class action *judgment* against defendant may be returned to defendant "when deterrence is not a goal of the statute or is not required by the circumstances"); *In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 721, 37 Cal.Rptr.3d 660 (2006) (noting, under California law, "a court approved settlement could properly include a 'reversion of . . . funds to the defendant,' such as the one-third reversion" of unclaimed settlement funds provided for in settlement therein) (citation omitted; ellipsis in original).

In sum, D'Aria has failed to demonstrate he "would offer any necessary elements to the proceeding that other parties would neglect." *See Arakaki*, 324 F.3d at 1086.

Accordingly, for the reasons set forth above, D'Aria has not shown, let alone made a "compelling showing" of, *see Arakaki*, 324 F.3d at 1086, inadequate representation. Consequently, even if his motion to intervene had been timely, said motion, for this additional reason, will be denied.[6]

CONCLUSION

For the reasons set forth above, D'Aria's motion to intervene in the instant action is hereby DENIED.

This order terminates Docket No. 130.

IT IS SO ORDERED.

Dated: January 17, 2007

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

---

6. In light of this ruling, the Court does not reach plaintiffs' argument that D'Aria's counsel engaged in unethical conduct by criticizing the manner in which Kaufmann, his former client, withdrew his motion to intervene in the instant action.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED NOVEMBER 16, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. C-04-3525 MMC

JEFF BOWMAN, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC.,

Defendant.

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

Appendix D

ORDER DENYING ANTHONY DARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF

Before the Court is "Anthony Daria's Motion To Join Or Be Substituted For Lawrence R. Kaufmann As (1) Objector To Proposed Settlement And (2) Movant And Intervenor-Plaintiff In Motion To Intervene, For Consolidation, & For Other Relief," filed November 16, 2006.

In a letter and declaration filed November 15, 2006, Kaufman withdrew his objection to the proposed settlement in *Bowman*. By separate order filed concurrently herewith, the Court has found approval for such withdrawal is not necessary, as Kaufmann is not a member of the *Bowman* class and thus lacks standing to assert any objection to the *Bowman* settlement. Daria cites no authority permitting him to join or substitute in another person's objection and thus avoid any argument that Daria's objection is untimely, much less any authority permitting him to join or substitute himself in place of a person who has withdrawn an objection. Moreover, Daria, like Kaufmann, is not a member of the *Bowman* class and, thus, lacks standing to object to the proposed *Bowman*

settlement.[1] Accordingly, Daria's motion to join in Kaufmann's withdrawn objection, or to substitute himself in place of Kaufmann for purposes of asserting Kaufmann's withdrawn objection, is hereby DENIED.

By the instant motion, Daria further seeks to join or substitute as the movant in Kaufmann's withdrawn motions to intervene in the *Bowman* and *Glass* actions. Daria cites no authority permitting him to join or substitute himself as the movant for purposes of asserting another person's motion to intervene. Moreover, because Kaufmann has withdrawn his motions to intervene, there are no motions pending in which Daria can "join" or "substitute." Accordingly, Daria's motion to join in Kaufmann's motions to intervene, or to substitute himself in place of Kaufmann for purposes of making such motions, is hereby DENIED.

---

1. The *Bowman* action is asserted on behalf of a class consisting of all persons who, between June 30, 2000 and the present, worked for UBS as a Financial Advisor or Financial Advisor Trainee in California. (*See* Second Amended Complaint ("SAC") ¶ 6.) Daria's counsel attests Daria was employed by UBS as a broker in New York. (*See* Halebian Decl. ¶ 2.) "The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals." *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989). Consequently, "non-class members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement." *See id.*; *see also San Francisco NAACP v. San Francisco Unified School District*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) (holding "nonclass members have no standing to object to the settlement of a class action").

Appendix D

This order terminates Docket No. 136 in Case No. 04-3525 and Docket No. 86 in Case No. 06-4068.

IT IS SO ORDERED.

Dated: November 16, 2006

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING FILED MAY 18, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15278

D.C. No. CV-06-04068-MMC
Northern District of California, San Francisco

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor - Appellant.

Appendix E

No. 07-15309

D.C. No. CV-06-04068-MMC
Northern District of California, San Francisco

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs,

and

MARTY EVANS,

Plaintiff - Appellant,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor.

Appendix E

ORDER

Before: FARRIS, NOONAN and McKEOWN, Circuit Judges.

The panel has issued an amended memorandum disposition. Accordingly, the petitions for rehearing are DENIED.

The full court has been advised of the Petitions for Rehearing En Banc and no judge of the court has requested a vote on the Petitions for Rehearing En Banc. Fed. R. App. P. 35. Appellants' Petitions for Rehearing En Banc are DENIED.

No further petitions for rehearing and petitions for rehearing en banc will be entertained.

43

(2)

No. 09-341

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTHONY D'ARIA,

Petitioner,

v.

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-and-

UBS FINANCIAL SERVICES, INC., a corporation, UBS PAINE WEBBER, a corporation, PAINE WEBBER GROUP, INC., a corporation,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UBS FINANCIAL SERVICES, INC.

KIRBY C. WILCOX
PAUL W. CANE, JR.*
HEATHER N. MITCHELL
PAUL, HASTINGS, JANOFSKY & WALKER LLP
55 Second Street, Twenty-Fourth Floor
San Francisco, CA 94105-3441
(415) 856-7000

* *Counsel of Record* *Attorneys for Respondent UBS Financial Services, Inc.*

225703

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

UBS Financial Services, Inc. ("UBS") is a wholly-owned subsidiary of UBS Americas Inc. Shares of UBS are not publicly traded.

UBS Americas Inc. is a wholly owned subsidiary of UBS AG. UBS AG is publicly traded on the New York Stock Exchange, the Swiss Stock Exchange, and the Tokyo Stock Exchange.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6 ...	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	v
SUMMARY OF REASONS FOR DENYING THE PETITION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION ...	6
I. D'Aria seeks an advisory opinion regarding a provision of the settlement agreement that never was triggered	6
II. D'Aria lacks standing to appeal the settlement agreement because he failed to file a timely objection or motion to intervene in the district court	8
CONCLUSION	11

TABLE OF APPENDICES

Page

Appendix A — Order (1) Granting Motions To Strike D'Aria Memorandum Filed In Response To Court's Order Re: Lawrence R. Kaufmann's Withdrawal Of Objections To Proposed Settlement; (2) Granting Approval Of Lawrence R. Kaufmann's Withdrawal Of Objections To Settlement **Of** The United States District Court For The Northern District Of California Filed January 17, 2007 ..... 1a

Appendix B — Declaration Of Anthony J. D'Aria In Support Of Motion To Intervene And For Other Relief **Of** The United States District Court For The Northern District Of California Filed January 10, 2007 ..... 7a

Appendix C — Order Re: Lawrence R. Kaufmann's Withdrawal Of Motion To Intervene And Objection To Settlement **Of** The United States District Court For The Northern District Of California Filed November 16, 2006 ..... 10a

Appendices

Page

Appendix D — Anthony D'Aria's Motion To Join Or Be Substituted For Lawrence R. Kaufmann As (1) Objector To Proposed Settlement And (2) Movant And Intervenor-Plaintiff In Motion To Intervene, For Consolidation, & For Other Relief Of The United States District Court For The Northern District Of California Filed November 16, 2006 ..... 12a

Appendix E — Consent To Join Form Filed September 25, 2006 ..... 22a

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937) 7

Devlin v. Scardelletti, 536 U.S. 1 (2002) 8

Laird v. Tatum, 408 U.S. 1 (1972) 7

Princeton University v. Schmid, 455 U.S. 100 (1982) 7

San Jose Mercury News, Inc. v. U.S. District Court, 187 F.3d 1096 (9th Cir. 1999) 9

United States v. Alisal Water, 370 F.3d 915 (9th Cir. 2004) 9

Weinman v. Fidelity Capital Appreciation Fund (In re Integra Realty Resources, Inc.), 354 F.3d 1246 (10th Cir. 2004) 8

SUMMARY OF REASONS FOR DENYING THE PETITION

The Court should deny review of the unpublished memorandum disposition. The case is not properly justiciable under Article III. First, petitioner Anthony D'Aria seeks an advisory opinion on the question presented. The ruling he seeks, on the attorney's fee-reversion provision at issue, would have no consequences in his case because the Ninth Circuit found that no amount of the attorney's fee at issue would revert, to the settling defendant or anyone else. Second, D'Aria lacks standing even to make the argument because he was denied leave to intervene in the case. He is not a proper party.

In any event, D'Aria identifies no conflict in the court of appeals cases that warrants this Court's review even assuming *arguendo* that the Article III defects in the petition could be overlooked or resolved.

STATEMENT OF THE CASE

On June 30, 2006, plaintiffs filed this consolidated class and collective action ("*Glass*") in the United States District Court for the Northern District of California. They alleged that: (1) UBS misclassified an alleged class of non-California Financial Advisors as exempt from overtime laws; and (2) UBS violated state laws by not reimbursing the class for certain business-related expenses.

UBS previously had mediated and agreed to settle *Bowman v. UBS Financial Services, Inc.*, in which a

purported class of California Financial Advisors made similar allegations. The district court in the Northern District of California (Chesney, J.) preliminarily approved the *Bowman* settlement on July 6, 2006, and granted final approval on November 22, 2006.

Meanwhile, the *Glass* parties also mediated and agreed to a settlement. On July 7, 2006, Judge Chesney granted the *Glass* parties' joint motion to relate this case to *Bowman*. On August 25, 2006, Judge Chesney provisionally certified the class and granted preliminary approval of the *Glass* settlement.

The settlement resolved the named plaintiffs' and class members' federal and state-law claims for a maximum amount of $45,000,000. *See* Pet. App. 13a. The maximum payout included up to $11,250,000 in attorney's fees and litigation costs to class counsel, subject to court approval; a pool of up to $100,000 in enhancements to be divided among the named class representatives, subject to court approval; and a reasonable amount to the claims administrator to administer the settlement ($182,847.90). *See* Pet. App. 14a. If the court awarded less than the requested attorney's fees or class representative enhancements, the residual would revert to UBS. The remainder of the maximum payout (approximately $33,467,152) was available for distribution to class members. *See id.*

Following preliminary approval, the settlement administrator sent notice packets to 13,176 class members by first-class mail. The class members had until November 14, 2006 to object. *See* Pet. App. 15a. Eight class members timely objected to the settlement.

Id. (In addition, the New York State Attorney General filed an *amicus curiae* brief, which the district court treated as an objection. *Id.*) Four of the objectors thought the *Glass* action never should have been filed at all; they objected to the settlement to register their "offense" and "disgust" at what they saw as a "pure opportunistic case" that improperly sought to turn Financial Advisors into "time-card punching employee[s] focused on overtime pay." The remaining objectors contended that the settlement was too lean, for various reasons.

Petitioner D'Aria was not one of the objectors. To the contrary, on September 22, 2006, he filed a "consent[] to be a party plaintiff . . . and authorize[d] Class Counsel to act on [his] behalf in all matters relating to this action, including the settlement of [his] claims." Resp. App. 22a.

Meanwhile, in an unrelated matter, UBS had been preparing to sue Lawrence Kaufmann, a former UBS employee, for not repaying an employee loan. Kaufmann, in turn, was preparing a cross-complaint alleging (among other things) wrongful discharge. Kaufmann was a member of the *Bowman* class, and on September 21, 2006 he objected to the *Bowman* settlement. A few weeks later, on October 13, 2006, Kaufmann moved to intervene in both *Bowman* and *Glass*. Kaufmann's counsel, George Mahr III, then approached UBS and proposed that Kaufmann would abandon his wrongful termination allegations and withdraw with prejudice his objections and motion to intervene in *Glass*, if UBS dropped its threatened lawsuit and forgave Kaufmann's obligation to repay the loan. UBS executed a settlement

with Kaufmann on the terms that Kaufmann's counsel proposed. On November 15, 2006, Kaufmann filed notice of the settlement in the district court and asked the court to withdraw his objection (in *Bowman*) and motions to intervene (in both *Bowman* and *Glass*).

The following day, D'Aria moved to join or be substituted for Kaufmann as (1) an objector to a proposed settlement in *Bowman*, and (2) a movant and intervenor-plaintiff in a motion to intervene, for consolidation, and for other relief in *Bowman* and *Glass*. Resp. App. 12a-21a. The court denied his motion because D'Aria "cite[d] no authority permitting him to join or substitute himself as the movant for purposes of asserting another person's motion to intervene." Pet. App. 76a. Moreover, because D'Aria filed his motion *after* Kaufmann withdrew his motions to intervene, there were no "motions pending in which D'Aria [could] 'join' or 'substitute.'" Pet App. 77a.

That same day, the court ordered the parties to file memoranda "addressing whether [the district court] should approve Kaufmann's motion to withdraw his objections to the proposed settlement." Resp. App. 11a. The parties did so, as did D'Aria. D'Aria subsequently moved to intervene in *Glass* on December 15, 2006. *See* Pet. App. 54a.

On January 17, 2007, the district court issued orders addressing Kaufmann's motion to withdraw and D'Aria's various motions. First, the court struck D'Aria's memorandum regarding Kaufmann's motion to withdraw because (1) "D'Aria, as a member of the class, is represented by plaintiffs' [class] counsel; when the

Court sought the parties' comments on the propriety of permitting Kaufmann to withdraw his objections, the Court did not invite the filing of individual briefs by members of the class," Resp. App. 3a; and (2) D'Aria did not timely object to the proposed settlement, and the court previously had denied D'Aria's untimely request to adopt Kaufmann's objections as his own, *id.* Second, the court approved Kaufmann's withdrawal of objections to the settlement because they largely were redundant of the comments of the New York Attorney General. Resp. App. 5a-6a. Finally, the court denied D'Aria's motion to intervene, because it was untimely and D'Aria was adequately represented. Pet. App. 60a-67a.

On January 26, 2007, the district court granted final approval of the settlement. The district court reviewed *de novo* the issues covered in a Special Master's report, carefully considered the objections raised, and found that none of the objections warranted rejection of the settlement because the settlement was fair, reasonable, and adequate. Pet. App. 44a. The district court also awarded the entire amount of the agreed-upon fees to class counsel. Pet. App. 51a, 53a. Thus, the reversionary provision D'Aria now disputes never was triggered.

The Ninth Circuit affirmed the district court's order on May 14, 2009, in an unpublished memorandum disposition. It held that D'Aria lacked standing to challenge the fairness of the settlement agreement or the reasonableness of class counsel's fees because he had failed to file a timely objection or motion to intervene. Pet. App. 10a.

REASONS FOR DENYING THE PETITION

D'Aria has failed to present a question that even is justiciable under Article III, let alone one appropriate for this Court's review. First, he seeks an advisory opinion regarding the validity of reversionary provisions in class action settlement agreements. Resolution of that question will not affect the result in this case because the reversionary clause never was triggered; the district court and court of appeals affirmed the attorney's fee in full. Second, D'Aria lacks standing to appeal because, as the Ninth Circuit held, he did not timely object to, or intervene in, the proceedings below. D'Aria consented to the settlement and then waited until one month after the deadline to object had passed before he moved to intervene. The district court properly exercised its discretion in finding inadequate justification for his delay.

I. D'ARIA SEEKS AN ADVISORY OPINION REGARDING A PROVISION OF THE SETTLEMENT AGREEMENT THAT NEVER WAS TRIGGERED

D'Aria seeks review of an issue that is not presented. He contests a provision of the settlement agreement which stated that any portion of the agreed-upon attorney's fee not awarded to class counsel would revert to UBS. That provision is not at issue here because there never was any reversion; the district court awarded the entire agreed-upon fee to class counsel, and the Ninth Circuit affirmed.

In essence, therefore, D'Aria seeks an advisory opinion on reversionary clauses, in violation of the Article III case-or-controversy requirement. "A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . It must be a real and substantial controversy . . . , as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (citations omitted); *accord Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam) ("We do not sit to decide hypothetical questions or give advisory opinions about issues as to which there are not adverse parties before us."). Because D'Aria presents only a hypothetical question about the validity of reversionary clauses in class action settlement agreements — the resolution of which will not affect the rights of the litigants in *this* case — he cannot satisfy Article III's case-or-controversy requirement.

D'Aria contends, however, that the reversionary clause chills judicial review of fee awards by diminishing the incentive of potential objectors to question them. But "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'" *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (citation omitted). Here, D'Aria cannot demonstrate even a chill, let alone any actual harm, because the objectors in this case *did* (unsuccessfully) challenge the fee award. In the absence of actual evidence, therefore, D'Aria is left with unsubstantiated generalizations to support his claim.

In sum, this Court should deny review because D'Aria's petition fails to raise an Article III case or controversy. There is little reason to consider the validity of reversionary provisions in any event; even D'Aria concedes the absence of any conflict in the court of appeals decisions on this issue. Pet. at 18. But even if the Court were to find the issue of reversionary clauses worthy of review, this case is not the appropriate vehicle to do it, for the simple reason that the reversionary provision here never was triggered.

II. D'ARIA LACKS STANDING TO APPEAL THE SETTLEMENT AGREEMENT BECAUSE HE FAILED TO FILE A TIMELY OBJECTION OR MOTION TO INTERVENE IN THE DISTRICT COURT

Even if the issues D'Aria raises were justiciable, he is not a proper party to assert them.

It is fundamental that a class member who would appeal a class settlement must object in the district court. *E.g.*, *Devlin v. Scardelletti*, 536 U.S. 1, 11 (2002); *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 354 F.3d 1246, 1256-58 (10th Cir. 2004). D'Aria did not object to the settlement agreement in this case. Instead, he consented to be a party plaintiff and authorized class counsel to settle his claims. D'Aria therefore lacks standing to challenge the settlement agreement.

Three months after consenting to join the settlement, D'Aria sought to intervene in *Glass*. D'Aria's motion to intervene came too late in the proceedings. He moved one month after the November 14, 2006

deadline to object and two months after consulting with his counsel regarding the "issues involved in the actions and their proposed settlements" (in early to mid-September). Resp. App. 8a.

The settlement did not change after he joined. Nor had the litigation entered a new stage of the proceedings. The only thing that had changed was Kaufmann's withdrawal of his own intervention request, which by definition did not involve D'Aria. If D'Aria felt his interests would no longer be adequately protected by the parties, he would have learned this earlier, when he received notice of the settlement, *see San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1101 (9th Cir. 1999).

D'Aria thus has no justification for his delay. A party must intervene when he "knows or has reason to know that his interests might be adversely affected by the outcome of litigation." *United States v. Alisal Water*, 370 F.3d 915, 923 (9th Cir. 2004) (quoting *United States v. Oregon*, 913 F.2d 576, 589 (9th Cir. 1990)). D'Aria consented to join the settlement almost three months before moving to intervene. In consenting to join, he authorized *Glass* class counsel to act on his behalf and sought his share of the settlement.

The Kaufmann objections, withdrawal, and settlement have nothing to do with D'Aria. He was free to object or intervene at any time after he received notice of the settlement, including at a time when Kaufmann's motion was pending. Indeed, as the district court noted, the class notice "expressly provided that any class member who failed to object in the manner

set forth in the Class Notice would be 'deemed to have waived any objections and [would] be foreclosed from making any objection.'" Pet. App. 66a. D'Aria now contends that he detrimentally relied on Kaufmann's involvement, but the class notice he received specifically warned him of his obligation to file his own objections. *See id.*

D'Aria thus failed to file a timely objection or motion to intervene in the proceedings below, and now lacks standing to challenge approval of the settlement agreement on appeal. D'Aria's petition is dismissive on the significance his lack of standing. Pet. at 8 ("Procedural obstacles thwarted D'Aria . . . . , [but] [t]he procedural merits of D'Aria's efforts to be heard . . . are immaterial here. . . ."). Article III's requirements, however, cannot be cast aside so casually. D'Aria asserts no justiciable controversy.

CONCLUSION

This Court should deny review. D'Aria seeks an advisory opinion on the validity of fee-reversion provisions. Moreover, D'Aria lacks standing to challenge the settlement on appeal given his failure to do so in the district court. These Article III defects are dispositive.

Respectfully submitted,

KIRBY C. WILCOX
PAUL W. CANE, JR.*
HEATHER N. MITCHELL
PAUL, HASTINGS, JANOFSKY & WALKER LLP
55 Second Street, Twenty-Fourth Floor
San Francisco, CA 94105-3441
(415) 856-7000

Attorneys for Respondent
UBS Financial Services, Inc.

* *Counsel of Record*

APPENDIX

APPENDIX A — ORDER (1) GRANTING MOTIONS TO STRIKE D'ARIA MEMORANDUM FILED IN RESPONSE TO COURT'S ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO PROPOSED SETTLEMENT; (2) GRANTING APPROVAL OF LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO SETTLEMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 17, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER (1) GRANTING MOTIONS TO STRIKE D'ARIA MEMORANDUM FILED IN RESPONSE TO COURT'S ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO PROPOSED SETTLEMENT; (2) GRANTING APPROVAL OF LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO SETTLEMENT

(Docket Nos. 106, 121)

Appendix A

On November 15, 2006, the Court received, from an attorney representing proposed intervenor Lawrence R. Kaufmann ("Kaufmann"), a letter dated November 13, 2006, along with Kaufmann's declaration, by which documents Kaufmann sought to withdraw his motion to intervene in the instant action. By order issued November 16, 2006, the Court deemed the motion to intervene withdrawn, but noted that the motion also contained objections to the proposed class action settlement and that such objections "may be withdrawn only with the court's approval." *See* Fed. R. Civ. P. 23(e)(4)(B). In its November 16, 2006 order, the Court afforded "the parties" the opportunity to brief the issue of whether the Court should approve Kaufmann's withdrawal of his objections to the proposed settlement. (*See* Order re: Lawrence R. Kaufmann's Withdrawal of Motion to Intervene and Objection to Settlement, filed Nov. 16, 2006, at 1.)

On December 1, 2006, plaintiffs and defendants, respectively, filed separate responses to the Court's November 16, 2006 order, arguing, in each instance, that the Court should permit Kaufmann to withdraw his objections. Also on that date, Kaufmann's former counsel of record filed a memorandum on behalf of class member Anthony D'Aria ("D'Aria") along with an accompanying declaration from counsel (collectively, "D'Aria memorandum"), arguing that the Court should not permit Kaufmann to withdraw his objections.

On December 1, 2006, plaintiffs filed a motion to strike the D'Aria memorandum. On December 11, 2006,

defendants filed a separate motion to strike the D'Aria memorandum. On December 29, 2006, D'Aria filed a consolidated opposition to the motions to strike, and, on January 5, 2007, UBS filed a reply.[1]

The Court will GRANT the motions to strike the D'Aria memorandum, for two reasons. First, D'Aria, as a member of the class, is represented by plaintiffs' counsel; when the Court sought the parties' comments on the propriety of permitting Kaufmann to withdraw his objections, the Court did not invite the filing of individual briefs by members of the class. Second, D'Aria did not submit a timely objection to the proposed settlement[2] and, by the instant memorandum, is expressly endeavoring to adopt Kaufmann's objections as his own; the Court has already denied D'Aria's request for such relief. (*See* Order Denying Anthony D'Aria's Motion to Join or be Substituted for Lawrence R. Kaufmann, filed Nov. 16, 2006, at 2.)

Turning to the issue of whether Kaufmann's withdrawal of his objections to the proposed settlement should be approved, the Court first finds, contrary to the arguments of both plaintiffs and defendants, Kaufmann's objections were timely. Although Kaufmann

1. Plaintiffs have not filed a reply.

2. Indeed, rather than file an objection, D'Aria submitted a consent form authorizing plaintiffs' counsel to act on his behalf, as well as a claim form, by which D'Aria sought to participate in the proposed settlement. (*See* Wilcox Reply Decl. Exs. A and B.)

did not separately file his objections in the format set forth in the Class Notice, he substantially complied with the Class Notice by submitting those objections in his motion to intervene, which was filed prior to the deadline for objecting to the settlement. As Rule 23(e)(4)(B) does not limit its applicability to objections made only in a particular format, the Court finds said Rule is applicable to Kaufmann's request to withdraw.

As noted, pursuant to Rule 23(e)(4)(B), a class member's objection to a proposed settlement "may be withdrawn only with the court's approval." *See* Fed. R. Civ. P. 23(e)(4)(B). The Rule itself does not set forth the circumstances under which such approval may be given, nor is there any controlling authority on the issue. The Advisory Committee Notes, however, provide the following guidance:

> Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.
>
> Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to

> a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

See Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments.

Here, Kaufmann's objections were made on grounds that apply generally to the class. Although those objections were withdrawn on terms that did not directly affect the terms of the class settlement or Kaufmann's participation therein, Kaufmann did obtain a personal benefit, forgiveness of a loan, in exchange for withdrawing. (*See* Kaufmann Decl., filed Nov. 15, 2006, ¶¶ 2-4.)[3] Nevertheless, Kaufmann is not the sole objector,

3. There is no admissible evidence to support D'Aria's contention that UBS first approached Kaufmann to induce him (Cont'd)

and the Court has before it, as submitted by other class members and, as amicus, by the Attorney General of the State of New York, largely the same arguments against the proposed settlement that were asserted by Kaufmann. Under such circumstances, the Court finds it appropriate to allow Kaufmann to withdraw his objections.

Accordingly, for the reasons set forth above,

1. Plaintiffs' and defendants' motions to strike the D'Aria memorandum are hereby GRANTED.

2. Kaufmann's withdrawal of his objections to the proposed settlement is hereby APPROVED.

This order terminates Docket Nos. 106 and 121.

IT IS SO ORDERED.

Dated: January 17, 2007

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

(Cont'd)
to withdraw. Rather, the evidence is to the contrary. (*See id.*; *see also* Notice of Lawrence R. Kaufmann's Withdrawn Objection to Proposed Settlement Ex. C (Browne Decl.), filed Nov. 14, 2006, ¶¶ 2-6.) The Court sustains defendants' objection to the hearsay declaration of Kenneth Lehn, filed December 15, 2006, in support of D'Aria's motion to intervene.

APPENDIX B — DECLARATION OF ANTHONY J. D'ARIA IN SUPPORT OF MOTION TO INTERVENE AND FOR OTHER RELIEF OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 10, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-06-04068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

DECLARATION OF ANTHONY J. D'ARIA IN SUPPORT OF MOTION TO INTERVENE AND FOR OTHER RELIEF

Date: January 19, 2007
Time: 9:00 a.m.
Ctrm: 7
Judge: Hon. Maxine M. Chesney

Appendix B

I, ANTHONY J. D'ARIA, declare as follows:

1. I am a member in Strategic Wealth Management, LLC, located in Briarcliff Manor, New York.

2. I was formerly employed as a Financial Advisor (broker) by UBS Financial Services, Inc., in New York, New York, from April 21, 2001, to June 30, 2006.

3. Beginning in early to mid-September, 2006, and continuing in October, 2006, I discussed with John Halebian on several occasions this action and the related action concerning UBS brokers in California. Mr. Halebian consulted me about issues involved in the actions and their proposed settlements, and I provided him with various assistance and information. During that time I became aware that Mr. Halebian was challenging the adequacy of the settlements on behalf of another former UBS broker.

On November 15, 2006, after learning that the other broker had suddenly exited the litigation, I authorized Mr. Halebian to challenge the adequacy of the settlements on my behalf and to put me forward in place of the other broker. I have regularly discussed with Mr. Halebian his efforts on my behalf in these actions, including discussions about the Court's decisions, the making of an appeal from some of those decisions, and the withdrawal of that appeal.

Appendix B

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was executed at Briarcliff Manor, New York, on January 9, 2007.

_____/s/_____
ANTHONY J. D'ARIA

Signature attestation: I hereby attest that I have on file the holograph signature for the conformed signature indicated above by /s/ in this e-filed document.

_____/s/_____
JOHN HALEBIAN

APPENDIX C — ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF MOTION TO INTERVENE AND OBJECTION TO SETTLEMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED NOVEMBER 16, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF MOTION TO INTERVENE AND OBJECTION TO SETTLEMENT

On November 15, 2006, the Court received a letter from an attorney on behalf of Lawrence R. Kaufmann ("Kaufmann"), dated November 13, 2006, along with Kaufmann's declaration, by which documents Kaufmann notified the Court that Kaufman was withdrawing his motion to intervene in the instant action.

Kaufmann may, without court approval, withdraw his motion to intervene, and the Court considers said motion to be withdrawn. A class member's objections to a proposed class action settlement "may be withdrawn only with the court's approval," however. *See* Fed. R. Civ. P. 23(e)(4)(B). Kaufmann's motion to intervene contains various objections to the proposed settlement in the instant action. Accordingly, the Court must determine whether to approve Kaufmann's request to withdraw said objections, or to deny Kaufmann's request and consider said objections at the January 19, 2007 fairness hearing.

Because plaintiffs and defendants have not had an opportunity to address the issue, the Court will afford the parties an opportunity to brief the matter. Accordingly, no later than December 1, 2006, the parties may file memoranda addressing the issue of whether the Court should approve Kaufmann's motion to withdraw his objections to the proposed settlement. The matter will be taken under submission at that time, unless the Court, after reviewing the parties' submissions, determines oral argument would assist the Court.

IT IS SO ORDERED.

Dated: November 16, 2006

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX D — ANTHONY D'ARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, & FOR OTHER RELIEF OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED NOVEMBER 16, 2006

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

Appendix D

Date: November 17, 2006
Time: 9:00am
Ctrm: 7

Case No. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

ANTHONY D'ARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, & FOR OTHER RELIEF

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on November 17, 2006, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of The Honorable

Appendix D

Maxine M. Chesney, United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, Anthony D'Aria will and hereby does respectfully move this Court:

(1) To add Mr. D'Aria, or substitute Mr. D'Aria for Lawrence R. Kaufmann, as an objector pursuant to the Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing ("the Kaufmann Objections," *Bowman* Docket No. 81);

(2) To add Mr. D'Aria, or substitute Mr. D'Aria for Mr. Kaufmann, as movant and putative intervenor-plaintiff in Kaufmann's Motion to Intervene, for Consolidation and for Other Relief ("the Motion to Intervene," *Bowman* Docket No. 83, *Glass* Docket No. 37); and

(3) For an order, pursuant to L.R. 6-1(b), shortening time for the Court to hear and decide this motion in the hearing scheduled for November 17, 2006.

Memorandum of Points and Authorities

On November 14, 2006, Defendant UBS filed an extraordinary "notice" ("the Notice", *Bowman* Docket No. 133, *Glass* Docket No. 82) that purports to terminate all present and future activity in this litigation by a party

adverse to defendant-objector and putative intervenor-plaintiff Lawrence R. Kaufmann. In particular, the Notice purports to withdraw both the Kaufmann Objections and the Motion to Intervene.

1. The purported "Notice" is defective on its face, and this Court should (a) treat it instead as a motion by Kaufmann for leave to withdraw from his previous role in the litigation, and (b) fully explore the underlying events

As an initial matter, although the Notice purports to announce the withdrawal of the Kaufmann Objections, Rule 23(e)(4)(B) of the Federal Rules of Civil Procedure clearly provides to the contrary that "[a]n objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval." Both on this ground, and because of the highly suspect and irregular events leading to the Notice (discussed below), this Court should treat the Notice as merely a motion for leave to undertake the actions of which it purports to give notice, and should thereupon proceed to explore the underlying facts in a full evidentiary hearing. In furtherance of this factual exploration, Mr. D'Aria should be permitted to depose the participants in the events leading to the Notice and to obtain discovery of all relevant communications among them.

2. The underlying, secret deal between Kaufmann and defendant is highly suspect ethically and legally, and is manifestly intended to derail this Court's consideration of the substantive issues Kaufmann previously raised for the benefit of class members

This highly irregular Notice strongly suggests underlying acts of collusion, fraud, commercial bribery and/or breach of fiduciary duty by Kirby Wilcox, defendant's outside counsel; Vincent P. Browne, defendant's in-house counsel; George L. Mahr, III, Mr. Kaufmann's New Jersey counsel; and Mr. Kaufmann himself. The purported basis for the Notice is a side-deal secretly reached on November 7, 2006, between defendant and Mr. Kaufmann, according to which Mr. Kaufmann agreed to terminate comprehensively all his activities in the interests of other class members in the instant litigation in exchange for release of a private debt owed to UBS. (*See* Exs. A, B and C to the Notice.) The letter and declarations offered in support of the Notice are carefully crafted to provide the least, possible information about this deal—omitting, for example, any information about when negotiations began, by whom they were initiated, or about the conditions under which they were conducted. (*Id.*)

Although on the present record the precise shape of the underlying impropriety remains murky, it is difficult, if not impossible, to imagine a scenario under which such a deal could be consummated without ethical and legal misconduct. It is clear that Mr. Kaufmann has

breached the fiduciary duty to other class members that he took on as putative intervenor-plaintiff and proposed class representative, by negotiating a private deal to abandon, in detail, all his present and future activities for benefit of the class in the instant litigation (preserving only his personal right to "opt in" to the settlement).[1] Mr. Kaufmann has done so for personal financial gain entirely unrelated to any claims in this litigation; in effect, defendant bribed Mr. Kaufmann to collude with defendant in this litigation.[2] In a fraud on

---

1. A class representative is a fiduciary. "He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. . . . He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the State to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549-50 (1949). *See Armour v. Network Assocs.*, 171 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001) (Jenkins, J.). *See also Wang v. Chinese Daily News, Inc.*, 2006 WL 1635423, at *1 (C.D. Cal. May 9, 2006) (granting the plaintiffs' motion to strike the defendants' rule 68 offer of judgment as creating "an unresolvable conflict between class representative's fiduciary duty to the class and their own personal interest").

2. Both Mr. Kaufmann and his secret New Jersey counsel, George L. Mahr, III, reside in New Jersey. Section 2C:21-10 of the New Jersey Criminal Code provides, "A person commits a crime if he solicits, accepts or agrees to accept any benefit as

(Cont'd)

his own counsel, Mr. Kaufmann undertook his negotiations with defendant through separate counsel without ever informing his counsel in the instant litigation, who continued to actively prosecute the Kaufmann Objections and the Motion to Intervene throughout the secret negotiations, and indeed well after the deal was reached. Mr. Kaufmann maintained this silence, and defendant failed to inform this Court of the resulting deal, until one week after the deal was reached, *i.e.*, just a few days before the hearing on the *Bowman* settlement scheduled for November 17, 2006—a subterfuge aimed at preventing argument to the Court of Mr. Kaufmann's earlier objections and motions relating to settlement. Mr. Kaufmann thus not only ceased to defend the interests of other class members, but actively and affirmatively colluded with defendant to undermine those interests.

In every respect, both the deal's terms and its prolonged concealment were manifestly calculated by defendant (and apparently dictated to Mr. Kaufmann) to maximize the adverse impact on the prosecution of objections to the proposed settlements in the instant actions.

(Cont'd)

consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as . . . (2) A trustee, guardian, or other fiduciary." As Messrs. Wilcox, Browne and Mahr all admittedly coordinated or facilitated the payment of the "benefit as consideration" to Mr. Kaufmann to breach his fiduciary duty to class members, all are potentially liable under Section 2C:21-10.

3. To protect the interests of class members on issues originally raised but now abandoned by Kaufmann, former UBS broker Anthony D'Aria should immediately be permitted to join or replace Kaufmann as objector, movant and intervenor-plaintiff

Defendant should not be permitted to quash the Kaufmann Objections and the Motion to Intervene by the simple expedient of buying off the individual class member who made them, thereby benefiting from the illicit and potentially criminal conduct underlying the Notice. As evident from the extensive briefings to this Court in anticipation of the hearing on the *Bowman* settlement scheduled for November 17, 2006, the Kaufmann Objections and the Motion to Intervene raise serious questions about the adequacy of both the *Bowman* and *Glass* settlements. The Notice is a transparent effort to silence those questions without ever reaching their merits. The adequacy of the *Bowman* and *Glass* settlements, however, is a matter that affects all 12,800 potential class members in the actions.

At the same time, Mr. Kaufmann is manifestly no longer able to hold himself out as an objector, intervenor-plaintiff, and putative class representative interested in protecting the interests of other class members, having colluded with defendant to breach his fiduciary duty to class members for private gain, and incidentally committed fraud on his own counsel in this litigation.

Anthony D'Aria therefore seeks leave of this Court to join and, at an appropriate time, to replace Mr. Kaufmann as objector and as movant for intervention, consolidation and other relief in this litigation. As a former UBS broker in New York from April 21, 2001 to June 30, 2006, Mr. D'Aria is fully qualified to object, intervene, and otherwise act as putative class representative to protect the interests of class members in the *Bowman* and *Glass* actions. Allowing the substitution of Mr. D'Aria as putative class representative in place of Mr. Kaufmann would "protect class interests" and so should be permitted. See *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 230 F.R.D. 61, 80 (D. Mass. 2005). As that court noted, such substitution is consistent with the Manual for Complex Litigation. The Manual itself provides:

> Replacement . . . may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation. In such circumstances, courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The court may permit intervention by a new representative or may simply designate that person as a representative in the order granting class certification.

§ 21.26, at 277, Manual for Complex Litigation, Fourth (footnotes omitted). *See also Davis v. Thornburgh*, 903

F.2d 212, 233 (3d Cir. 1990) (Becker, J., dissenting) ("afford[ing] an opportunity to provide a substitute . . . is the common practice").

In the urgent circumstances created by Mr. Kaufmann's and defendant's deliberately disruptive and illicit tactics, Mr. D'Aria respectfully urges the Court to exercise its discretion to waive the timing requirements that would normally apply to his motion, and to hear and decide the motion in his favor in the hearing scheduled for November 17, 2006. This will enable Mr. D'Aria to participate in this litigation immediately in place of Mr. Kaufmann so that the Court's consideration of the proposed *Bowman* and *Glass* settlements may proceed fully and fairly without delay.

Dated: November 16, 2006

Respectfully submitted,

LOVELL STEWART HALEBIAN LLP

By _____/s/_____
JOHN HALEBIAN (*Pro Hac Vice*)

Attorneys for Lawrence R. Kaufmann

APPENDIX E — CONSENT TO JOIN FORM FILED SEPTEMBER 25, 2006

CONSENT TO JOIN SETTLEMENT

ANTHONY J. D'ARIA
57 MOUNTAIN RD
PLEASANTVILLE NY 10570-1911

Mail to:

Kevin McInerney, Esq.
McInerney & Jones
18124 Wedge Parkway, Suite 503
Reno, NV 89511

Anthony D'Aria consents to be a party plaintiff in the above action pursuant to Section 16(b) of the Fair Labor Standards Act, and authorizes Class Counsel to act on his/her behalf in all matters relating to this action, including the settment of his/her claims.

Anthony D'Aria
Print or Type Name

s/ Anthony D'Aria
Signature

Date: 9-22-06

Address: 57 Mountain Rd
Pleasantville NY

Telephone #: (914) 769-2602
(646) 220-3327

143 (3)

No. 09-341

Supreme Court, U.S.
FILED
OCT 27 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTHONY D'ARIA,

Petitioner,

v.

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-and-

UBS FINANCIAL SERVICES, INC., a corporation, UBS PAINE WEBBER, a corporation, PAINE WEBBER GROUP, INC., a corporation,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

SANFORD F. YOUNG
LAW OFFICES OF
SANFORD F. YOUNG
225 Broadway
Suite 2008
New York, NY 10007
(212) 227-9755

JOHN HALEBIAN
Counsel of Record
ADAM C. MAYES
LOVELL STEWART
HALEBIAN LLP
317 Madison Avenue
21st Floor
New York, NY 10017
(212) 500-5010

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF APPENDICES ii

TABLE OF CITED AUTHORITIES iii

PETITIONER'S REPLY BRIEF 1

I. D'Aria Challenges the Entire Proposed Settlement on the Basis of Its Reversionary Fee Structure, Not Merely the Structure's Effect if Attorneys' Fees Were Reduced. 2

II. If There Is Merit in D'Aria's Argument that the Proposed Settlement's Reversionary Fee Structure Inherently Violates the Rights of Absent Class Members, Then the Courts Below Necessarily Erred When They Failed to Grant D'Aria Status as Either an Objector or an Intervenor. 5

CONCLUSION 13

TABLE OF APPENDICES

Page

Appendix A — Declaration Of Kenneth K. Lehn Dated December 15, 2006 ..... 1a

Appendix B — Notice Of Lawrence R. Kaufmann's Withdrawn: (1) Objection To Proposed Settlement And Intention To Appear At Settlement Hearing; And (2) Motions To Intervene, For Consolidation, And For Other Relief Dated November 14, 2006 ... 4a

Appendix C — Notice Of Pendency Of Class Action And Opportunity To Opt In, Proposed Settlement And Hearing Date For Court Approval Dated August 21, 2006 ..... 19a

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 3

Devlin v. Scardelletti,
536 U.S. 1 (2002) 11

In re General Motors Corp.,
55 F.3d 768 (3rd Cir. 1995) 6

In re Global Crossing Secs. & ERISA Litig.,
225 F.R.D. 436, 457 fn.10 (S.D.N.Y. 2004) 12

In re Worldcom,
2005 WL 2319118 (S.D.N.Y. 2005) 12

Laird v. Tatum,
408 U.S. 1 (1972) 3

San Jose Mercury News, Inc. v. U.S. Dist. Court - Northern Dist. (San Jose),
187 F.3d 1096 (9th Cir. 1999) 11

Vollmer v. Selden,
530 F.3d 656 (7th Cir. 2003) 6

Cited Authorities

Page

United States Constitution

First Amendment 3

Statute:

29 U.S.C. § 216 12

Rules:

Fed. R. Civ. P. 23 ..... *passim*

Respondent UBS fails to contest the reasons advanced by Petitioner Anthony D'Aria in support of his petition for certiorari. Instead, UBS asserts two procedural barriers to review that are without merit.

First, contrary to UBS's argument, D'Aria does not seek an advisory opinion. D'Aria's petition seeks to overturn the entire proposed settlement. The question posed is whether the proposed settlement's reversionary fee structure, which has been condemned by legal scholars as a *per se* breach of class counsel's ethical and fiduciary duties to the class, demonstrates both that absent class members were inadequately represented and that the proposed settlement is unfair and inadequate under Rule 23. Contrary to UBS's misguided argument, the question is not where the money would go if the attorneys' fees were slashed.

Second, D'Aria's procedural standing to challenge the proposed settlement comes into question solely because of a perfunctory and inaccurate timeliness analysis in the courts below which ignored blatant manipulation of the settlement approval process by UBS (which UBS attempts to obscure with unsworn and unattributed facts absent from the record below). In the settlement approval process under Rule 23, courts have a fiduciary obligation to safeguard the interests of absent class members. If there is merit in D'Aria's contention that the proposed settlement inherently violates the due process rights of absent class members, then by definition, the courts below failed adequately to protect absent class members' interests when they allowed highly artificial timeliness considerations to deprive D'Aria of procedural status to challenge the settlement.

I. D'Aria Challenges the Entire Proposed Settlement on the Basis of Its Reversionary Fee Structure, Not Merely the Structure's Effect if Attorneys' Fees Were Reduced.

UBS is disingenuous in suggesting that D'Aria seeks an "advisory opinion" on the attorney's fee provision which will not affect the rights of the litigants. The gravamen of D'Aria's petition is that the proposed settlement's reversionary fee structure poisons the entire settlement:

> [A] class action settlement shaped by the ethical conflicts, perverse incentives and procedural distortions of a reversionary fee structure *ipso facto* is not "fair, reasonable and adequate" under Rule 23(e)(2) and should not be approved. . . . [A] reversionary fee structure [also] renders adequate representation under Rule 23(a)(4) impossible, and poses an insurmountable obstacle to settlement-only class certification antecedent to settlement approval.

Pet. Br. 11.

A reversionary fee structure causes *immediate* harm to absent class members' interests, *i.e.*, inadequate representation, and an unfair and inadequate settlement. The damaging consequences of the structure that D'Aria identifies had their effect on the proposed settlement long before the district court was ever called on to consider the proposed attorney's fees. The proposed settlement was shaped by the breaches of class counsel's duties that arise from

payment by an adversary (Pet. Br. 12-13), and by multiple perverse incentives and opportunities to trade class interests for the interests of the plaintiff's counsel and defendants who negotiated it (Pet. Br. 14-16); simply by adopting the reversionary fee structure, class counsel imposed an unjustifiable economic loss on the class (Pet. Br. 16-17); and both objection and judicial review for the benefit of absent class members were inhibited during the settlement approval process (Pet. Br. 17-19)—all irrespective of whether the district court ever actually invoked the reversionary fee provision (indeed, the district court was predictably dissuaded from doing so). Thus, the effects of the reversionary fee structure identified by D'Aria do not concern "a hypothetical state of facts," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) as UBS contends, but are concrete reasons to reject the proposed settlement in its entirety.

For the same reasons, UBS's strained analogy of D'Aria's claims to a non-justiciable "subjective chill" of First Amendment rights, *Laird v. Tatum*, 408 U.S. 1 (1972), is inapposite. No credence should be given UBS's unstated implication that the settlement's structural features challenged by D'Aria are a mere technicality in a proposed settlement that otherwise deserves approval. While D'Aria's petition focuses on the reversionary fee structure because it is the central legal issue raised by the settlement, his wider argument in the courts below identified numerous other, concrete and troubling features of the settlement which are closely related to the conflicts and perverse incentives associated with a reversionary fee structure. Thus, D'Aria alleged in the courts below that:

— The proposed settlement followed a *de minimus* investigation by counsel and 16-page boilerplate complaint, with no adversarial motion practice, discovery, or litigation whatsoever. Class counsel reached a "quickie" settlement in less than four months before UBS even answered any of the underlying complaints that were consolidated solely for purposes of settlement.

— The action's history, intertwined with the settlement of an earlier, related California case, *Bowman v. UBS Financial Services*, Case No. C-04-03525 MMC, suggested a nationwide (ex-California) settlement was collusively pre-packaged without any intention of adversarial litigation.

— Class counsel relied on UBS's data and expert analysis of damages without expert assistance for the class, and settled for what D'Aria calculated (in the only written estimate ever provided to the court) to be 4 or 5 cents on the dollar of claimed losses.

— The legal fees of $11,250,000 for plaintiff's counsel were exorbitant in relation to the negligible prosecution of the action; the district court speculated that the fees represented a lodestar multiplier of at least ten, and the parties did not contradict D'Aria's estimate that the multiplier was over forty.

— The notice to class members failed adequately to disclose the settlement's reversionary structure, both as to legal fees and as to the overall value of the settlement to class members.

Cf. Pet. Br. 7-8.

II. If There Is Merit in D'Aria's Argument that the Proposed Settlement's Reversionary Fee Structure Inherently Violates the Rights of Absent Class Members, Then the Courts Below Necessarily Erred When They Failed to Grant D'Aria Status as Either an Objector or an Intervenor.

1. Starting months before the final approval hearing on the proposed settlement, D'Aria made several applications to challenge the settlement as both an objector and as an intervenor-plaintiff. Either status provides standing to appeal the proposed settlement. The district court and the court of appeals, however, failed to admit D'Aria as either an objector or an intervenor, and thereby avoided any consideration of the merits of his contentions on procedural grounds.

Both with respect to objection and intervention, the procedural barriers erected against D'Aria in the courts below rest on a wholly artificial calculation of his timeliness, as explained below. If D'Aria's contentions concerning the interests of absent class members have any merit, it also follows that the district court abused its discretion (and the Ninth Circuit erred in affirming) when it allowed such a timeliness analysis to deprive

him of any status to challenge the settlement on absent class members' behalf. The rights of absent class members are a principal concern of the settlement approval process established by Rule 23(e), and courts have a fiduciary obligation to safeguard them. *See* Pet. Br. 10-11 (citing cases). The participation of both objectors and intervenors is favored in the settlement approval process because their presence adds an adversarial voice concerning the proposed settlement that serves this purpose. *See, e.g., Vollmer v. Selden*, 530 F.3d 656, 660 (7th Cir. 2003) (intervenors counter-act collusive incentives at settlement stage), *In re General Motors Corp.*, 55 F.3d 768, 803 (3rd Cir. 1995) (objectors valued to provide independently-derived information about settlement merits).

In practical terms, the procedural timeliness issue raised by UBS is ancillary to the merits of D'Aria's substantive challenge to the settlement and certainly does not stand in the way of this Court granting certiorari.

2. A summary timeline of the events concerning D'Aria's timeliness that are discussed below is as follows:

September 22, 2006:

> Lawrence Kaufmann, represented by Lovell Stewart Halebian LLP ("LSH"), counsel to D'Aria here, submits an objection in the related case, *Bowman v. UBS Financial Services*, in which he announces his intention to file a parallel objection in the instant action.

Late September 2006:

UBS contacts Kaufmann behind the back of LSH about withdrawing his *Bowman* objection in exchange for forgiveness of a $102,000 debt to UBS.[1]

October 13, 2006:

Kaufmann files motions through LSH to intervene in both actions.

November 7, 2006:

UBS and Kaufmann secretly reach a formal agreement for Kaufmann's withdrawal from both actions in exchange for forgiveness of his $102,000 debt.

November 14, 2006:

The deadline to file objections in the instant *Glass* action. UBS files notice late in the evening disclosing Kaufmann's withdrawal from both actions (Reply App. B).

November 16, 2006:

More than two months before the final approval hearing in the instant action, D'Aria, represented by Kaufmann's former class action counsel LSH, applies to substitute for Kaufmann as objector and proposed intervenor-plaintiff (Resp. App. D). The district court denies his application the same day before even receiving a response from UBS or class counsel (Pet. App. D).

---

1. *See* Reply App. A, ¶2. The district court, however, sustained a hearsay objection by UBS to this evidence. Resp. App. 6a, fn.

December 1, 2006:

D'Aria files a brief urging the court to preserve Kaufmann's objections in the instant action until D'Aria is able to reassert them.

December 15, 2006:

More than a month prior to the final approval hearing, D'Aria files his own motion to intervene in the instant action.

January 17, 2007:

The district court strikes D'Aria's brief on Kaufmann's objections and permits Kaufmann to withdraw them (Resp. App. A). The court simultaneously denies D'Aria's motion to intervene (Pet. App. C).

January 19, 2007:

Final approval hearing on the proposed settlement.

Cf. Pet. Br. 8, Resp. Br. 3-4.

3. D'Aria originally applied to substitute for objector and proposed intervenor Kaufmann on the morning of November 16, 2006, instead of on November 14—the deadline to object, when UBS first disclosed Kaufmann's withdrawal from the litigation. No practical difficulties whatsoever were posed by the timing of D'Aria's application. D'Aria sought to pursue arguments against the proposed settlement that had already been fully and timely asserted and briefed during the preceding months (by the same counsel) on behalf of Kaufmann. Moreover, D'Aria's application came more

than two months before the final approval hearing on the proposed settlement, scheduled for January 19, 2007.

D'Aria's purported untimeliness results solely from UBS's belated disclosure of Kaufmann's withdrawal on the very evening of the deadline to object. Given the swiftness of D'Aria's initial application to substitute for Kaufmann after that disclosure, there is no doubt that if Kaufmann's withdrawal had been disclosed even a single day earlier, D'Aria would have met the deadline and been able to challenge the proposed settlement (at the very least as an objector) without procedural difficulty. These circumstances strongly suggest that UBS exploited its private leverage against Kaufmann not merely to induce him to withdraw, but also to hide his abandonment of class interests from his own class action counsel while UBS strategically timed his exit to hinder entry of any substitute to speak on behalf of absent class members, such as D'Aria. Kaufmann never disclosed to his own class action counsel that he was negotiating with UBS to sell out class interests for private gain, even after he and UBS reached a formal agreement on November 7, 2006.[2] Apart from being rife with probable legal and ethical impropriety,[3] such a

2. The papers disclosing Kaufmann's withdrawal were filed by UBS, an adverse party. UBS's contrary statement (at Resp. Br. 4) that "*Kaufmann* filed notice of the settlement in the district court and asked the court to withdraw" (emph. added) is false. *See* Reply App. B.

3. D'Aria argued that UBS's deal with Kaufmann amounted under New Jersey law to commercial bribery of Kaufmann to breach his fiduciary duty to class members as a proposed class representative. Resp. App. 17a.

stratagem by UBS directly undermines the process established by Rule 23 to protect absent class members.

As it did in the Ninth Circuit, UBS presents to this Court unsworn and unattributed statements that were never presented to the district court, suggesting that Kaufmann initiated his withdrawal from the litigation.[4] *See* Resp. Br. 3. To the contrary, sworn testimony from Kaufmann's co-counsel in the class action indicated that UBS contacted Kaufmann days after he filed his initial objection in the related case in September, 2006.[5] Reply App. A, ¶2. The bare-bones information that UBS made available to the court (nearly identical declarations by Kaufmann and the attorneys who negotiated his private settlement with UBS, attached to UBS's notice disclosing his withdrawal) artfully omit to state when negotiations of his withdrawal began, reciting only that an agreement was reached on November 7, 2006. Reply App. B. The record on appeal remains effectively incomplete because the district court failed to press UBS for any further clarification of these events.

4. UBS implausibly argues that Kaufmann's withdrawal has no bearing on determining whether

---

4. Specifically, nothing in the record below supports UBS's statements that "UBS had been preparing to sue Lawrence Kaufmann [and] Kaufmann, in turn, was preparing a cross-complaint alleging (among other things) wrongful discharge," or that "Kaufmann's counsel, George Mahr III, then approached UBS. . . ." Resp. Br. 3; *cf.* Reply Apps. A and B (the information actually available to the district court).

5. The court sustained UBS's objection to this evidence as hearsay. Resp. App. 6a, fn.

D'Aria's motions to substitute for Kaufmann and to intervene were timely. Resp. Br. 9; *cf.* Pet. App. 65a-66a (district court holding that D'Aria failed to show reliance on Kaufmann). Long before D'Aria came forward to adopt Kaufmann's objections to the proposed settlement as his own, however, D'Aria was not only aware of the objections, but actually provided assistance and information to Kaufmann's class action counsel to prosecute them during September and October 2006 when they were being formulated and briefed to the court. Resp. App. 8a (D'Aria declaration).

D'Aria's obligation to move for intervention is properly measured not from when he learned merely that his interests were at stake in the litigation, but from when he learned that his interests were no longer represented by the existing parties to the litigation. *San Jose Mercury News, Inc. v. U.S. Dist. Court - Northern Dist. (San Jose)*, 187 F.3d 1096, 1101 (9th Cir. 1999) (In measuring delay in seeking intervention, the inquiry looks to when the intervenor became aware its interests would no longer be adequately protected by the parties). As a proposed intervenor and class representative, Kaufmann expressly sought to represent other absent class members—surely not least among them D'Aria, who personally assisted Kaufmann's motions and objections. Moreover, as an objector, Kaufmann was a party to the action. *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Hence, there was no reason, and no legal requirement, why D'Aria himself needed to duplicate Kaufmann's objections and motions. D'Aria only learned Kaufmann had traded the interests of other absent class members for a private deal when UBS disclosed Kaufmann's withdrawal, whereupon D'Aria immediately—and timely—acted to take up Kaufmann's

abandoned role. The district court thus clearly erred in denying intervention on timeliness grounds.

5. For similar reasons, assuming that DAria's contentions are meritorious, he should also have been granted the status of an objector. In the class action settlement approval process, courts may and regularly do consider the merits of procedurally defective objections. *See, e.g., In re Worldcom*, 2005 WL 2319118 at *1 fn.3, *13 fn.23 (S.D.N.Y. 2005) (two late objections addressed); *In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 457 fn.10 (S.D.N.Y. 2004) (six late objections considered without deciding whether untimeliness excusable). It was an abuse of discretion for a court with a fiduciary duty to absent class members to disregard a meritorious objection when the objection was in practice presented in good time, and the procedural defect was entirely due to a deliberate stratagem of the defendants.

UBS notes that D'Aria also submitted a consent to join the action, Resp. Br. 3 and 9, but this has no bearing on his right to object to (or intervene in) the proposed settlement. Unlike a Rule 23 class action from which class members have the right to "opt out", the collective action procedure established by the Fair Labor Standards Act, 29 U.S.C. § 216, requires participants to affirmatively "opt in". In the settlement context, therefore, a form of consent to join the collective action serves a similar purpose as a claim form in a conventional class action. Indeed, the settlement notice sent to class members in this action (which is both a collective action and a Rule 23 class action) expressly contemplates that objectors may also submit consents to join in order to assure their participation in the final settlement. *See* Reply App. C (excerpt of settlement notice).

CONCLUSION

For the foregoing reasons, D'Aria's petition for a writ of certiorari should be granted.

Respectfully submitted,

SANFORD F. YOUNG
LAW OFFICES OF
SANFORD F. YOUNG
225 Broadway
Suite 2008
New York, NY 10007
(212) 227-9755

JOHN HALEBIAN
Counsel of Record
ADAM C. MAYES
LOVELL STEWART
HALEBIAN LLP
317 Madison Avenue
21st Floor
New York, NY 10017
(212) 500-5010

Counsel for Petitioner

APPENDIX

APPENDIX A — DECLARATION OF KENNETH K. LEHN DATED DECEMBER 15, 2006

JOHN HALEBIAN (*Pro Hac Vice*)
ADAM C. MAYES (SBN 200188)
LOVELL STEWART HALEBIAN LLP
500 Fifth Avenue, 58th Floor
New York, NY 10110
Tel: (212) 608-1900
Fax: (212) 208-6806
212 Wood Street
Pacific Grove, CA 93950
Tel: (831) 333-0309
Fax: (831) 333-0325
jhalebian@lshllp.com

Attorneys for Anthony D'Aria, Intervenor-Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-06-04068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. et al.,

Defendants.

DECLARATION OF KENNETH K. LEHN IN SUPPORT OF ANTHONY D'ARIA'S MOTION TO INTERVENE

Appendix A

Date: January 19, 2007
Time: 9:00 a.m.
Ctrm: 7
Judge: Hon. Maxine M. Chesney

I, Kenneth K. Lehn, declare as follows:

1. I am an attorney licensed to practice in the State of New Jersey and a principal in the law firm of Winne, Banta, Hetherington, Basralian & Kahn, P.C., located in Hackensack, New Jersey. I am counsel to Lawrence R. Kaufmann concerning wage and hour actions against his former employers. Except where otherwise indicated, I have personal knowledge of the facts stated in this declaration, and if called upon to do so could and would competently testify to them.

2. In a telephone conversation on November 15, 2006, Mr. Kaufmann told me that UBS had contacted other counsel he retained in New Jersey (Mahr and Mahr, L.L.C.) about Mr. Kaufmann's indebtedness of $102,000 to UBS within days after his litigation counsel, Lovell Stewart Halebian LLP, filed Mr. Kaufmann's objections to the proposed settlement in *Bowman et al. v. UBS Financial Services, Inc.*, Case No. C-04-03525 MMC (*Bowman* docket no. 81).

3. On earlier occasions in October and November, 2006, when Mr. Kaufmann and I discussed issues regarding both the *Bowman* and *Glass* actions against UBS and other claims by him against other brokerage firms, he never disclosed to me that he was secretly

negotiating with or had reached a deal with UBS to withdraw his objections and motions in *Bowman* and in *Glass*.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was executed at East Orange, New Jersey, on December 15, 2006.

/s/
KENNETH K. LEHN

Signature attestation: I hereby attest that I have on file the holograph signature for the conformed signature indicated above by /s/ in this e-filed document.

/s/
JOHN HALEBIAN

APPENDIX B — NOTICE OF LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF DATED NOVEMBER 14, 2006

M. KIRBY C. WILCOX (SB# 78576)
kirbywilcox@paulhastings.com
PAUL, HASTINGS, JANOFSKY & WALKER LLP
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105-3441
Telephone: (415) 856-7000
Facsimile: (415) 856-7100
Attorneys for Defendant
UBS FINANCIAL SERVICES INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

Appendix B

CASE NO. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

NOTICE OF LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF

Date:	November 17, 2006
Time:	9:00 a.m.
Courtroom:	7
Judge:	Hon. Maxine M. Chesney

TO THE COURT AND ALL INTERESTED PARTIES:

Appendix B

PLEASE TAKE NOTICE THAT Lawrence R. Kaufmann ("Kaufmann") has withdrawn (1) his "Objection to the Proposed Settlement and Intention to Appear at the Settlement Hearing" in *Bowman v. UBS Financial Services, Inc. ("Bowman")* (C-04-03525 MMC) (Docket No. 81) and (2) his "Motion to Intervene, For Consolidation And For Other Relief" (Docket No. 83) in *Bowman* (Docket No. 83) and in *Glass v. UBS Financial Services, Inc.* ("*Glass*") (C-06-04068 MMC) (Docket No. 37) that he previously filed before this Court. The circumstances surrounding Kaufmann's withdrawal of such motions are provided in the attached documents (marked Exhibits A through C): (1) Letter from Kaufmann's attorney, George L. Mahr III, notifying the Court that Kaufmann has withdrawn these motions, (2) Kaufmann Declaration, and (3) Declaration of Vincent P. Browne.

DATED: November 14, 2006

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: /s/
M. KIRBY C. WILCOX

Attorneys for Defendant
UBS FINANCIAL SERVICES INC.

Appendix B

EXHIBIT A

MAHR AND MAHR, L.L.C.
ATTORNEYS AT LAW
80 MAIN STREET
P.O. BOX 534
MADISON, N.J. 07940
(973) 377-1961
FAX (973) 377-3705
CONCENTRATE PRACTICE IN
SECURITIES ARBITRATION & LITIGATION
AND CORPORATE LITIGATION

November 13, 2006

VIA UPS NEXT DAY DELIVERY

Judge Maxine Chesney
United States District Court
Northern District of California
450 Golden Gate Avenue, Dept. 7
San Francisco, CA 94102

Re: Notice of Withdrawn (1) "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" in *Bowman v. UBS Financial Services, Inc.* ("*Bowman*") (C-04-03525 MMC) and (2) "Motion to Intervene, for Consolidation and for Other Relief" in *Bowman* and *Glass v. UBS Financial Services, Inc.* ("*Glass*") (C-06-04068 MMC)

Appendix B

Dear Judge Chesney:

Please be advised that I represent Lawrence R. Kaufmann, a former employee of UBS Financial Services, Inc. I write to you to notify you of my client's decision to *with* the following:

(1) His "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" (Docket No. 81) in *Bowman* and

(2) His "Motion to Intervene, for Consolidation and for Other Relief" in *Bowman* (Docket No. 83) and *Glass* (Docket No. 37) that he previously filed before this Court.

In summary, on December 13, 2001, UBS Financial Services Inc., ("UBSFS") loaned Mr. Kaufmann a significant sum of money, which UBSFS agreed to forgive over a number of years of services performed by Mr. Kaufmann. His employment ended before the lapse of that time period. UBSFS has demanded repayment of the balance of this loan.

In settlement of their differences, Mr. Kaufmann proposed, through me, that if UBSFS forgave the entire outstanding loan balance, Mr. Kaufmann would agree to the following:

Accordingly, the Court finds "the reason for and length of the delay" in seeking intervention weighs against a finding of timeliness.

d. Conclusion

For the reasons set forth above, the Court finds D'Aria's motion to intervene is untimely and, consequently, that D'Aria has not shown he is entitled to intervene as a matter of right. *See Alisal*, 370 F.3d at 919 (holding "party seeking to intervene bears the burden of showing that *all* the requirements for intervention have been met") (emphasis in original).

4. Adequacy of Representation

Although D'Aria's motion for intervention as a matter of right fails because he has not demonstrated such motion is timely, the Court nonetheless will continue its analysis of the four-factor test.

The fourth and final factor is whether "the existing parties may not adequately represent the applicant's interest." *See Alisal*, 370 F.3d at 919. In determining adequacy of representation, the Court considers three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

Appendix C

"The most important factor in determining the adequacy of representation is how the interest compares with the interest of existing parties." *Id.* "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.* "If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." *Id.*

Here, D'Aria and the named *Glass* plaintiffs have the same ultimate objective: obtaining compensation for assertedly unpaid overtime and improper wage deductions. Indeed, D'Aria, in his proposed complaint-in-intervention, expressly adopts "all of the allegations of plaintiffs' complaint in this action except those that relate to the adequacy of the putative class representatives," and alleges no additional substantive causes of action against defendants. (*See* Proposed Complaint in Intervention ¶ 3.) Thus, D'Aria must make a "compelling showing" of inadequate representation. *See Arakaki*, 324 F.3d at 1086; *see also League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir.1997) ("When a proposed intervenor has not alleged any substantive disagreement between it and the existing parties to the suit, and instead has vested its claim for intervention entirely upon a disagreement over litigation strategy or legal tactics, courts have been hesitant to accord the applicant full-party status.").

D'Aria argues class counsel is inadequate for the following reasons: (1) the dollar amount of the settlement

is too low compared to the actual damages suffered by the class; (2) each class member in the instant action will receive significantly less than the recovery per class member in *Bowman;* (3) the instant action was settled without any formal discovery, expert analysis, or other formal litigation activity; (4) the attorneys' fees negotiated are too high compared to the time and effort expended; (5) the settlement was negotiated as a "claims made" settlement under which all unclaimed settlement funds and any portion of the claimed attorneys' fees that are not approved by the Court will revert to UBS; and (6) proper notice was not provided to the class. (*See* Motion at 2-3.) In essence, D'Aria complains that the amount of the settlement is too small, the amount of attorneys' fees sought is too large, and the circulation of the notice was too narrow.

In asserting the amount of the settlement is inadequate, D'Aria sets forth no analysis with respect to the likelihood of success on the merits of the class claims if such claims were tried rather than settled. *See, e.g., Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir.1998) (providing district court must consider, *inter alia,* "the strength of the plaintiffs' case" in determining whether a settlement is fair, reasonable, and adequate). Although D'Aria contends the *Glass* plaintiffs suffered between $240 million and $880 million in unpaid overtime,[2] he provides no analysis of the

2. The parties estimate the losses at approximately $128 million to $180 million. (*See* New York Attorney General Decl. Ex. 1 (Transcript of Aug. 11, 2006 preliminary approval hearing) at 13:1-14:5.)

applicability to the class members of the FLSA's administrative exemption. As discussed above, the Department of Labor recently issued an Opinion Letter stating the administrative exemption applies to stockbrokers and, consequently, that stockbrokers are not entitled to overtime pay under the FLSA. Because the reasonableness of the settlement depends not only on the claimed amount of damages, but also on a showing of the strength of the plaintiffs' case, and D'Aria fails to provide any analysis on the latter point, his computation of damages fails to provide adequate support for a finding that the amount of the settlement is inadequate.[3]

D'Aria's next contention is that the amount of the settlement is too low when compared with the settlement in *Bowman*. There is no evidence, however, that the *Bowman* and *Glass* settlements constitute parts of a single settlement, let alone a single settlement pursuant to which settlements funds were allocated to the *Bowman* class at the expense of the *Glass* class members. As the Court noted at the *Bowman* fairness hearing, the *Bowman* action was settled prior to the filing of any of the actions that ultimately were consolidated in the *Glass* action, and the amount of the

3. D'Aria's contention that plaintiffs' counsel did too little to prepare for settlement negotiations adds no further support in the absence of a showing that the settlement amount is inadequate. Consequently, the Court denies as moot defendants' motion, filed January 11, 2007, to strike the supplemental declaration of John Halebian as conclusory, in that the opinions challenged thereby concern the subject of adequate preparation.

Bowman settlement was unaffected in any way by the later settlement negotiations in the *Glass* action. (*See* McInerney Decl. Ex. 3 (Transcript of Nov. 17, 2006 *Bowman* fairness hearing) at 12:6-24.)

Moreover, D'Aria fails to set forth any independent analysis of the *Glass* class members' likelihood of success on the merits of their claims as compared to that of the *Bowman* plaintiffs. Rather, D'Aria relies entirely on the analysis set forth in the amicus brief submitted by the Attorney General of the State of New York, in which the Attorney General compared the California law applicable to the *Bowman* plaintiffs with the New York law applicable to the New York class members in the instant action. When UBS filed a detailed response to the amicus brief, explaining the differences between the two states' laws, the Attorney General filed a reply conceding California's overtime laws are significantly more favorable to plaintiffs than New York's overtime laws. D'Aria presents no argument to the contrary.

In arguing the amount of attorneys' fees negotiated reflects inadequate representation, D'Aria fails to recognize that the Ninth Circuit has held 25% of the gross settlement amount to be the benchmark for attorneys' fees awarded under the percentage method. *See, e.g., Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000). Here, the settlement provides for a maximum fee of $11,250,000, which is 25% of the $45 million settlement amount. (*See* Amended Joint Stipulation of Settlement ¶ 29(a).) Moreover, the Ninth Circuit has held that where, as here, the settlement provides that

unclaimed settlement funds revert to the defendant, the district court must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis of the amount of the fund actually claimed by the class. *See Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Consequently, D'Aria has failed to show counsel's claim for a 25% fee award indicates either some impropriety or inadequacy in counsel's representation.[4]

The Court likewise finds unpersuasive D'Aria's contention that plaintiffs' counsel inadequately represented the class by agreeing to a settlement under which any unclaimed settlement funds, or the amount by which attorneys' fees are reduced, will revert to UBS. D'Aria cites no authority holding improper a settlement providing for such reversion of unclaimed or unawarded funds; indeed, there is authority suggesting to the contrary. *See, e.g., Williams*, 129 F.3d at 1027 (discussing class action settlement without expressing concern as to provision for reversion of unclaimed funds to defendant); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 816 (5th Cir. 1989) (approving settlement containing provision that unclaimed funds under consent decree would be divided between plaintiffs' counsel and defendant); Herbert Newberg & Alba Conte, 3 Newberg on Class Actions §§ 10:15, 10:17 (4th ed.2002) (citing cases).[5]

---

4. The Court, of course, ultimately will determine whether the amount claimed should be awarded.

5. *See also Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (holding unclaimed (Cont'd)

Finally, with respect to notice, D'Aria argues that plaintiffs' counsel "failed to give proper notice to the class by misrepresenting the nature and amount of the proposed settlement, limiting actual notice solely to the last known address of class members, and failing to publish any notice in a widely circulated financial publication likely to be seen by class members." (*See* Motion to Intervene at 3:19-22.) D'Aria does not identify the asserted misrepresentations, and the Court is aware of none. Nor does D'Aria submit evidence supporting his assertion as to the use of addresses. By contrast, plaintiffs' counsel attests "notice was not limited to the last known address of class members; instead, the claims administrator did address updated searches and re-mails." (*See* McInerney Decl. ¶ 14; *see also* Holland Decl. ¶¶ 8-9.) Finally, plaintiffs' counsel attests he "took out a full page advertisement in the Registered Rep," which, he further attests, is a "monthly national publication subscribed to by a large number of brokerage houses, branches and brokers themselves." (*See id.* ¶ 15 and Ex. 10.) D'Aria submits no evidence to the contrary. Consequently, D'Aria has not shown the notice provided to the class was inadequate.

(Cont'd)
amount of class action *judgment* against defendant may be returned to defendant "when deterrence is not a goal of the statute or is not required by the circumstances"); *In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 721, 37 Cal.Rptr.3d 660 (2006) (noting, under California law, "a court approved settlement could properly include a 'reversion of . . . funds to the defendant,' such as the one-third reversion" of unclaimed settlement funds provided for in settlement therein) (citation omitted; ellipsis in original).

In sum, D'Aria has failed to demonstrate he "would offer any necessary elements to the proceeding that other parties would neglect." *See Arakaki*, 324 F.3d at 1086.

Accordingly, for the reasons set forth above, D'Aria has not shown, let alone made a "compelling showing" of, *see Arakaki*, 324 F.3d at 1086, inadequate representation. Consequently, even if his motion to intervene had been timely, said motion, for this additional reason, will be denied.[6]

CONCLUSION

For the reasons set forth above, D'Aria's motion to intervene in the instant action is hereby DENIED.

This order terminates Docket No. 130.

IT IS SO ORDERED.

Dated: January 17, 2007

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

---

6. In light of this ruling, the Court does not reach plaintiffs' argument that D'Aria's counsel engaged in unethical conduct by criticizing the manner in which Kaufmann, his former client, withdrew his motion to intervene in the instant action.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED NOVEMBER 16, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. C-04-3525 MMC

JEFF BOWMAN, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC.,

Defendant.

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

Appendix D

ORDER DENYING ANTHONY DARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF

Before the Court is "Anthony Daria's Motion To Join Or Be Substituted For Lawrence R. Kaufmann As (1) Objector To Proposed Settlement And (2) Movant And Intervenor-Plaintiff In Motion To Intervene, For Consolidation, & For Other Relief," filed November 16, 2006.

In a letter and declaration filed November 15, 2006, Kaufman withdrew his objection to the proposed settlement in *Bowman*. By separate order filed concurrently herewith, the Court has found approval for such withdrawal is not necessary, as Kaufmann is not a member of the *Bowman* class and thus lacks standing to assert any objection to the *Bowman* settlement. Daria cites no authority permitting him to join or substitute in another person's objection and thus avoid any argument that Daria's objection is untimely, much less any authority permitting him to join or substitute himself in place of a person who has withdrawn an objection. Moreover, Daria, like Kaufmann, is not a member of the *Bowman* class and, thus, lacks standing to object to the proposed *Bowman*

settlement.[1] Accordingly, Daria's motion to join in Kaufmann's withdrawn objection, or to substitute himself in place of Kaufmann for purposes of asserting Kaufmann's withdrawn objection, is hereby DENIED.

By the instant motion, Daria further seeks to join or substitute as the movant in Kaufmann's withdrawn motions to intervene in the *Bowman* and *Glass* actions. Daria cites no authority permitting him to join or substitute himself as the movant for purposes of asserting another person's motion to intervene. Moreover, because Kaufmann has withdrawn his motions to intervene, there are no motions pending in which Daria can "join" or "substitute." Accordingly, Daria's motion to join in Kaufmann's motions to intervene, or to substitute himself in place of Kaufmann for purposes of making such motions, is hereby DENIED.

---

1. The *Bowman* action is asserted on behalf of a class consisting of all persons who, between June 30, 2000 and the present, worked for UBS as a Financial Advisor or Financial Advisor Trainee in California. (*See* Second Amended Complaint ("SAC") ¶ 6.) Daria's counsel attests Daria was employed by UBS as a broker in New York. (*See* Halebian Decl. ¶ 2.) "The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals." *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989). Consequently, "nonclass members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement." *See id.*; *see also San Francisco NAACP v. San Francisco Unified School District*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) (holding "nonclass members have no standing to object to the settlement of a class action").

Appendix D

This order terminates Docket No. 136 in Case No. 04-3525 and Docket No. 86 in Case No. 06-4068.

IT IS SO ORDERED.

Dated: November 16, 2006

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING FILED MAY 18, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15278

D.C. No. CV-06-04068-MMC
Northern District of California, San Francisco

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor - Appellant.

Appendix E

No. 07-15309

D.C. No. CV-06-04068-MMC
Northern District of California, San Francisco

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs,

and

MARTY EVANS,

Plaintiff - Appellant,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor.

Appendix E

ORDER

Before: FARRIS, NOONAN and McKEOWN, Circuit Judges.

The panel has issued an amended memorandum disposition. Accordingly, the petitions for rehearing are DENIED.

The full court has been advised of the Petitions for Rehearing En Banc and no judge of the court has requested a vote on the Petitions for Rehearing En Banc. Fed. R. App. P. 35. Appellants' Petitions for Rehearing En Banc are DENIED.

No further petitions for rehearing and petitions for rehearing en banc will be entertained.

43

(2)

No. 09-341

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTHONY D'ARIA,

Petitioner,

v.

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-and-

UBS FINANCIAL SERVICES, INC., a corporation, UBS PAINE WEBBER, a corporation, PAINE WEBBER GROUP, INC., a corporation,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UBS FINANCIAL SERVICES, INC.

KIRBY C. WILCOX
PAUL W. CANE, JR.*
HEATHER N. MITCHELL
PAUL, HASTINGS, JANOFSKY & WALKER LLP
55 Second Street, Twenty-Fourth Floor
San Francisco, CA 94105-3441
(415) 856-7000

* *Counsel of Record* *Attorneys for Respondent UBS Financial Services, Inc.*

225703

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

UBS Financial Services, Inc. ("UBS") is a wholly-owned subsidiary of UBS Americas Inc. Shares of UBS are not publicly traded.

UBS Americas Inc. is a wholly owned subsidiary of UBS AG. UBS AG is publicly traded on the New York Stock Exchange, the Swiss Stock Exchange, and the Tokyo Stock Exchange.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6 ...	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	v
SUMMARY OF REASONS FOR DENYING THE PETITION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION ...	6
I. D'Aria seeks an advisory opinion regarding a provision of the settlement agreement that never was triggered	6
II. D'Aria lacks standing to appeal the settlement agreement because he failed to file a timely objection or motion to intervene in the district court	8
CONCLUSION	11

TABLE OF APPENDICES

Page

Appendix A — Order (1) Granting Motions To Strike D'Aria Memorandum Filed In Response To Court's Order Re: Lawrence R. Kaufmann's Withdrawal Of Objections To Proposed Settlement; (2) Granting Approval Of Lawrence R. Kaufmann's Withdrawal Of Objections To Settlement Of The United States District Court For The Northern District Of California Filed January 17, 2007 ..... 1a

Appendix B — Declaration Of Anthony J. D'Aria In Support Of Motion To Intervene And For Other Relief Of The United States District Court For The Northern District Of California Filed January 10, 2007 ..... 7a

Appendix C — Order Re: Lawrence R. Kaufmann's Withdrawal Of Motion To Intervene And Objection To Settlement Of The United States District Court For The Northern District Of California Filed November 16, 2006 ..... 10a

Appendices

Page

Appendix D — Anthony D'Aria's Motion To Join Or Be Substituted For Lawrence R. Kaufmann As (1) Objector To Proposed Settlement And (2) Movant And Intervenor-Plaintiff In Motion To Intervene, For Consolidation, & For Other Relief **Of** The United States District Court For The Northern District Of California Filed November 16, 2006 ..... 12a

Appendix E — Consent To Join Form Filed September 25, 2006 ..... 22a

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937) 7

Devlin v. Scardelletti, 536 U.S. 1 (2002) 8

Laird v. Tatum, 408 U.S. 1 (1972) 7

Princeton University v. Schmid, 455 U.S. 100 (1982) 7

San Jose Mercury News, Inc. v. U.S. District Court, 187 F.3d 1096 (9th Cir. 1999) 9

United States v. Alisal Water, 370 F.3d 915 (9th Cir. 2004) 9

Weinman v. Fidelity Capital Appreciation Fund (In re Integra Realty Resources, Inc.), 354 F.3d 1246 (10th Cir. 2004) 8

SUMMARY OF REASONS FOR DENYING THE PETITION

The Court should deny review of the unpublished memorandum disposition. The case is not properly justiciable under Article III. First, petitioner Anthony D'Aria seeks an advisory opinion on the question presented. The ruling he seeks, on the attorney's fee-reversion provision at issue, would have no consequences in his case because the Ninth Circuit found that no amount of the attorney's fee at issue would revert, to the settling defendant or anyone else. Second, D'Aria lacks standing even to make the argument because he was denied leave to intervene in the case. He is not a proper party.

In any event, D'Aria identifies no conflict in the court of appeals cases that warrants this Court's review even assuming *arguendo* that the Article III defects in the petition could be overlooked or resolved.

STATEMENT OF THE CASE

On June 30, 2006, plaintiffs filed this consolidated class and collective action ("*Glass*") in the United States District Court for the Northern District of California. They alleged that: (1) UBS misclassified an alleged class of non-California Financial Advisors as exempt from overtime laws; and (2) UBS violated state laws by not reimbursing the class for certain business-related expenses.

UBS previously had mediated and agreed to settle *Bowman v. UBS Financial Services, Inc.*, in which a

purported class of California Financial Advisors made similar allegations. The district court in the Northern District of California (Chesney, J.) preliminarily approved the *Bowman* settlement on July 6, 2006, and granted final approval on November 22, 2006.

Meanwhile, the *Glass* parties also mediated and agreed to a settlement. On July 7, 2006, Judge Chesney granted the *Glass* parties' joint motion to relate this case to *Bowman*. On August 25, 2006, Judge Chesney provisionally certified the class and granted preliminary approval of the *Glass* settlement.

The settlement resolved the named plaintiffs' and class members' federal and state-law claims for a maximum amount of $45,000,000. *See* Pet. App. 13a. The maximum payout included up to $11,250,000 in attorney's fees and litigation costs to class counsel, subject to court approval; a pool of up to $100,000 in enhancements to be divided among the named class representatives, subject to court approval; and a reasonable amount to the claims administrator to administer the settlement ($182,847.90). *See* Pet. App. 14a. If the court awarded less than the requested attorney's fees or class representative enhancements, the residual would revert to UBS. The remainder of the maximum payout (approximately $33,467,152) was available for distribution to class members. *See id.*

Following preliminary approval, the settlement administrator sent notice packets to 13,176 class members by first-class mail. The class members had until November 14, 2006 to object. *See* Pet. App. 15a. Eight class members timely objected to the settlement.

Id. (In addition, the New York State Attorney General filed an *amicus curiae* brief, which the district court treated as an objection. *Id.*) Four of the objectors thought the *Glass* action never should have been filed at all; they objected to the settlement to register their "offense" and "disgust" at what they saw as a "pure opportunistic case" that improperly sought to turn Financial Advisors into "time-card punching employee[s] focused on overtime pay." The remaining objectors contended that the settlement was too lean, for various reasons.

Petitioner D'Aria was not one of the objectors. To the contrary, on September 22, 2006, he filed a "consent[] to be a party plaintiff . . . and authorize[d] Class Counsel to act on [his] behalf in all matters relating to this action, including the settlement of [his] claims." Resp. App. 22a.

Meanwhile, in an unrelated matter, UBS had been preparing to sue Lawrence Kaufmann, a former UBS employee, for not repaying an employee loan. Kaufmann, in turn, was preparing a cross-complaint alleging (among other things) wrongful discharge. Kaufmann was a member of the *Bouman* class, and on September 21, 2006 he objected to the *Bouman* settlement. A few weeks later, on October 13, 2006, Kaufmann moved to intervene in both *Bouman* and *Glass*. Kaufmann's counsel, George Mahr III, then approached UBS and proposed that Kaufmann would abandon his wrongful termination allegations and withdraw with prejudice his objections and motion to intervene in *Glass*, if UBS dropped its threatened lawsuit and forgave Kaufmann's obligation to repay the loan. UBS executed a settlement

with Kaufmann on the terms that Kaufmann's counsel proposed. On November 15, 2006, Kaufmann filed notice of the settlement in the district court and asked the court to withdraw his objection (in *Bowman*) and motions to intervene (in both *Bowman* and *Glass*).

The following day, D'Aria moved to join or be substituted for Kaufmann as (1) an objector to a proposed settlement in *Bowman*, and (2) a movant and intervenor-plaintiff in a motion to intervene, for consolidation, and for other relief in *Bowman* and *Glass*. Resp. App. 12a-21a. The court denied his motion because D'Aria "cite[d] no authority permitting him to join or substitute himself as the movant for purposes of asserting another person's motion to intervene." Pet. App. 76a. Moreover, because D'Aria filed his motion *after* Kaufmann withdrew his motions to intervene, there were no "motions pending in which D'Aria [could] 'join' or 'substitute.'" Pet App. 77a.

That same day, the court ordered the parties to file memoranda "addressing whether [the district court] should approve Kaufmann's motion to withdraw his objections to the proposed settlement." Resp. App. 11a. The parties did so, as did D'Aria. D'Aria subsequently moved to intervene in *Glass* on December 15, 2006. *See* Pet. App. 54a.

On January 17, 2007, the district court issued orders addressing Kaufmann's motion to withdraw and D'Aria's various motions. First, the court struck D'Aria's memorandum regarding Kaufmann's motion to withdraw because (1) "D'Aria, as a member of the class, is represented by plaintiffs' [class] counsel; when the

Court sought the parties' comments on the propriety of permitting Kaufmann to withdraw his objections, the Court did not invite the filing of individual briefs by members of the class," Resp. App. 3a; and (2) D'Aria did not timely object to the proposed settlement, and the court previously had denied D'Aria's untimely request to adopt Kaufmann's objections as his own, *id.* Second, the court approved Kaufmann's withdrawal of objections to the settlement because they largely were redundant of the comments of the New York Attorney General. Resp. App. 5a-6a. Finally, the court denied D'Aria's motion to intervene, because it was untimely and D'Aria was adequately represented. Pet. App. 60a-67a.

On January 26, 2007, the district court granted final approval of the settlement. The district court reviewed *de novo* the issues covered in a Special Master's report, carefully considered the objections raised, and found that none of the objections warranted rejection of the settlement because the settlement was fair, reasonable, and adequate. Pet. App. 44a. The district court also awarded the entire amount of the agreed-upon fees to class counsel. Pet. App. 51a, 53a. Thus, the reversionary provision D'Aria now disputes never was triggered.

The Ninth Circuit affirmed the district court's order on May 14, 2009, in an unpublished memorandum disposition. It held that D'Aria lacked standing to challenge the fairness of the settlement agreement or the reasonableness of class counsel's fees because he had failed to file a timely objection or motion to intervene. Pet. App. 10a.

REASONS FOR DENYING THE PETITION

D'Aria has failed to present a question that even is justiciable under Article III, let alone one appropriate for this Court's review. First, he seeks an advisory opinion regarding the validity of reversionary provisions in class action settlement agreements. Resolution of that question will not affect the result in this case because the reversionary clause never was triggered; the district court and court of appeals affirmed the attorney's fee in full. Second, D'Aria lacks standing to appeal because, as the Ninth Circuit held, he did not timely object to, or intervene in, the proceedings below. D'Aria consented to the settlement and then waited until one month after the deadline to object had passed before he moved to intervene. The district court properly exercised its discretion in finding inadequate justification for his delay.

I. D'ARIA SEEKS AN ADVISORY OPINION REGARDING A PROVISION OF THE SETTLEMENT AGREEMENT THAT NEVER WAS TRIGGERED

D'Aria seeks review of an issue that is not presented. He contests a provision of the settlement agreement which stated that any portion of the agreed-upon attorney's fee not awarded to class counsel would revert to UBS. That provision is not at issue here because there never was any reversion; the district court awarded the entire agreed-upon fee to class counsel, and the Ninth Circuit affirmed.

In essence, therefore, D'Aria seeks an advisory opinion on reversionary clauses, in violation of the Article III case-or-controversy requirement. "A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . It must be a real and substantial controversy . . . , as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (citations omitted); *accord Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam) ("We do not sit to decide hypothetical questions or give advisory opinions about issues as to which there are not adverse parties before us."). Because D'Aria presents only a hypothetical question about the validity of reversionary clauses in class action settlement agreements — the resolution of which will not affect the rights of the litigants in *this* case — he cannot satisfy Article III's case-or-controversy requirement.

D'Aria contends, however, that the reversionary clause chills judicial review of fee awards by diminishing the incentive of potential objectors to question them. But "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'" *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (citation omitted). Here, D'Aria cannot demonstrate even a chill, let alone any actual harm, because the objectors in this case *did* (unsuccessfully) challenge the fee award. In the absence of actual evidence, therefore, D'Aria is left with unsubstantiated generalizations to support his claim.

In sum, this Court should deny review because D'Aria's petition fails to raise an Article III case or controversy. There is little reason to consider the validity of reversionary provisions in any event; even D'Aria concedes the absence of any conflict in the court of appeals decisions on this issue. Pet. at 18. But even if the Court were to find the issue of reversionary clauses worthy of review, this case is not the appropriate vehicle to do it, for the simple reason that the reversionary provision here never was triggered.

II. D'ARIA LACKS STANDING TO APPEAL THE SETTLEMENT AGREEMENT BECAUSE HE FAILED TO FILE A TIMELY OBJECTION OR MOTION TO INTERVENE IN THE DISTRICT COURT

Even if the issues D'Aria raises were justiciable, he is not a proper party to assert them.

It is fundamental that a class member who would appeal a class settlement must object in the district court. *E.g.*, *Devlin v. Scardelletti*, 536 U.S. 1, 11 (2002); *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 354 F.3d 1246, 1256-58 (10th Cir. 2004). D'Aria did not object to the settlement agreement in this case. Instead, he consented to be a party plaintiff and authorized class counsel to settle his claims. D'Aria therefore lacks standing to challenge the settlement agreement.

Three months after consenting to join the settlement, D'Aria sought to intervene in *Glass*. D'Aria's motion to intervene came too late in the proceedings. He moved one month after the November 14, 2006

deadline to object and two months after consulting with his counsel regarding the "issues involved in the actions and their proposed settlements" (in early to mid-September). Resp. App. 8a.

The settlement did not change after he joined. Nor had the litigation entered a new stage of the proceedings. The only thing that had changed was Kaufmann's withdrawal of his own intervention request, which by definition did not involve D'Aria. If D'Aria felt his interests would no longer be adequately protected by the parties, he would have learned this earlier, when he received notice of the settlement, *see San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1101 (9th Cir. 1999).

D'Aria thus has no justification for his delay. A party must intervene when he "knows or has reason to know that his interests might be adversely affected by the outcome of litigation." *United States v. Alisal Water*, 370 F.3d 915, 923 (9th Cir. 2004) (quoting *United States v. Oregon*, 913 F.2d 576, 589 (9th Cir. 1990)). D'Aria consented to join the settlement almost three months before moving to intervene. In consenting to join, he authorized *Glass* class counsel to act on his behalf and sought his share of the settlement.

The Kaufmann objections, withdrawal, and settlement have nothing to do with D'Aria. He was free to object or intervene at any time after he received notice of the settlement, including at a time when Kaufmann's motion was pending. Indeed, as the district court noted, the class notice "expressly provided that any class member who failed to object in the manner

set forth in the Class Notice would be 'deemed to have waived any objections and [would] be foreclosed from making any objection.'" Pet. App. 66a. D'Aria now contends that he detrimentally relied on Kaufmann's involvement, but the class notice he received specifically warned him of his obligation to file his own objections. *See id.*

D'Aria thus failed to file a timely objection or motion to intervene in the proceedings below, and now lacks standing to challenge approval of the settlement agreement on appeal. D'Aria's petition is dismissive on the significance his lack of standing. Pet. at 8 ("Procedural obstacles thwarted D'Aria . . . . , [but] [t]he procedural merits of D'Aria's efforts to be heard . . . are immaterial here. . . ."). Article III's requirements, however, cannot be cast aside so casually. D'Aria asserts no justiciable controversy.

CONCLUSION

This Court should deny review. D'Aria seeks an advisory opinion on the validity of fee-reversion provisions. Moreover, D'Aria lacks standing to challenge the settlement on appeal given his failure to do so in the district court. These Article III defects are dispositive.

Respectfully submitted,

KIRBY C. WILCOX
PAUL W. CANE, JR.*
HEATHER N. MITCHELL
PAUL, HASTINGS, JANOFSKY & WALKER LLP
55 Second Street, Twenty-Fourth Floor
San Francisco, CA 94105-3441
(415) 856-7000

Attorneys for Respondent
UBS Financial Services, Inc.

* *Counsel of Record*

APPENDIX

APPENDIX A — ORDER (1) GRANTING MOTIONS TO STRIKE D'ARIA MEMORANDUM FILED IN RESPONSE TO COURT'S ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO PROPOSED SETTLEMENT; (2) GRANTING APPROVAL OF LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO SETTLEMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 17, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER (1) GRANTING MOTIONS TO STRIKE D'ARIA MEMORANDUM FILED IN RESPONSE TO COURT'S ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO PROPOSED SETTLEMENT; (2) GRANTING APPROVAL OF LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO SETTLEMENT

(Docket Nos. 106, 121)

Appendix A

On November 15, 2006, the Court received, from an attorney representing proposed intervenor Lawrence R. Kaufmann ("Kaufmann"), a letter dated November 13, 2006, along with Kaufmann's declaration, by which documents Kaufmann sought to withdraw his motion to intervene in the instant action. By order issued November 16, 2006, the Court deemed the motion to intervene withdrawn, but noted that the motion also contained objections to the proposed class action settlement and that such objections "may be withdrawn only with the court's approval." *See* Fed. R. Civ. P. 23(e)(4)(B). In its November 16, 2006 order, the Court afforded "the parties" the opportunity to brief the issue of whether the Court should approve Kaufmann's withdrawal of his objections to the proposed settlement. (*See* Order re: Lawrence R. Kaufmann's Withdrawal of Motion to Intervene and Objection to Settlement, filed Nov. 16, 2006, at 1.)

On December 1, 2006, plaintiffs and defendants, respectively, filed separate responses to the Court's November 16, 2006 order, arguing, in each instance, that the Court should permit Kaufmann to withdraw his objections. Also on that date, Kaufmann's former counsel of record filed a memorandum on behalf of class member Anthony D'Aria ("D'Aria") along with an accompanying declaration from counsel (collectively, "D'Aria memorandum"), arguing that the Court should not permit Kaufmann to withdraw his objections.

On December 1, 2006, plaintiffs filed a motion to strike the D'Aria memorandum. On December 11, 2006,

defendants filed a separate motion to strike the D'Aria memorandum. On December 29, 2006, D'Aria filed a consolidated opposition to the motions to strike, and, on January 5, 2007, UBS filed a reply.[1]

The Court will GRANT the motions to strike the D'Aria memorandum, for two reasons. First, D'Aria, as a member of the class, is represented by plaintiffs' counsel; when the Court sought the parties' comments on the propriety of permitting Kaufmann to withdraw his objections, the Court did not invite the filing of individual briefs by members of the class. Second, D'Aria did not submit a timely objection to the proposed settlement[2] and, by the instant memorandum, is expressly endeavoring to adopt Kaufmann's objections as his own; the Court has already denied D'Aria's request for such relief. (*See* Order Denying Anthony D'Aria's Motion to Join or be Substituted for Lawrence R. Kaufmann, filed Nov. 16, 2006, at 2.)

Turning to the issue of whether Kaufmann's withdrawal of his objections to the proposed settlement should be approved, the Court first finds, contrary to the arguments of both plaintiffs and defendants, Kaufmann's objections were timely. Although Kaufmann

1. Plaintiffs have not filed a reply.

2. Indeed, rather than file an objection, D'Aria submitted a consent form authorizing plaintiffs' counsel to act on his behalf, as well as a claim form, by which D'Aria sought to participate in the proposed settlement. (*See* Wilcox Reply Decl. Exs. A and B.)

did not separately file his objections in the format set forth in the Class Notice, he substantially complied with the Class Notice by submitting those objections in his motion to intervene, which was filed prior to the deadline for objecting to the settlement. As Rule 23(e)(4)(B) does not limit its applicability to objections made only in a particular format, the Court finds said Rule is applicable to Kaufmann's request to withdraw.

As noted, pursuant to Rule 23(e)(4)(B), a class member's objection to a proposed settlement "may be withdrawn only with the court's approval." *See* Fed. R. Civ. P. 23(e)(4)(B). The Rule itself does not set forth the circumstances under which such approval may be given, nor is there any controlling authority on the issue. The Advisory Committee Notes, however, provide the following guidance:

> Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.
>
> Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to

> a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

See Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments.

Here, Kaufmann's objections were made on grounds that apply generally to the class. Although those objections were withdrawn on terms that did not directly affect the terms of the class settlement or Kaufmann's participation therein, Kaufmann did obtain a personal benefit, forgiveness of a loan, in exchange for withdrawing. (*See* Kaufmann Decl., filed Nov. 15, 2006, ¶¶ 2-4.)[3] Nevertheless, Kaufmann is not the sole objector,

3. There is no admissible evidence to support D'Aria's contention that UBS first approached Kaufmann to induce him (Cont'd)

and the Court has before it, as submitted by other class members and, as amicus, by the Attorney General of the State of New York, largely the same arguments against the proposed settlement that were asserted by Kaufmann. Under such circumstances, the Court finds it appropriate to allow Kaufmann to withdraw his objections.

Accordingly, for the reasons set forth above,

1. Plaintiffs' and defendants' motions to strike the D'Aria memorandum are hereby GRANTED.

2. Kaufmann's withdrawal of his objections to the proposed settlement is hereby APPROVED.

This order terminates Docket Nos. 106 and 121.

IT IS SO ORDERED.

Dated: January 17, 2007

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

(Cont'd)
to withdraw. Rather, the evidence is to the contrary. (*See id.*; *see also* Notice of Lawrence R. Kaufmann's Withdrawn Objection to Proposed Settlement Ex. C (Browne Decl.), filed Nov. 14, 2006, ¶¶ 2-6.) The Court sustains defendants' objection to the hearsay declaration of Kenneth Lehn, filed December 15, 2006, in support of D'Aria's motion to intervene.

APPENDIX B — DECLARATION OF ANTHONY J. D'ARIA IN SUPPORT OF MOTION TO INTERVENE AND FOR OTHER RELIEF OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 10, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-06-04068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

DECLARATION OF ANTHONY J. D'ARIA IN SUPPORT OF MOTION TO INTERVENE AND FOR OTHER RELIEF

Date: January 19, 2007
Time: 9:00 a.m.
Ctrm: 7
Judge: Hon. Maxine M. Chesney

Appendix B

I, ANTHONY J. D'ARIA, declare as follows:

1. I am a member in Strategic Wealth Management, LLC, located in Briarcliff Manor, New York.

2. I was formerly employed as a Financial Advisor (broker) by UBS Financial Services, Inc., in New York, New York, from April 21, 2001, to June 30, 2006.

3. Beginning in early to mid-September, 2006, and continuing in October, 2006, I discussed with John Halebian on several occasions this action and the related action concerning UBS brokers in California. Mr. Halebian consulted me about issues involved in the actions and their proposed settlements, and I provided him with various assistance and information. During that time I became aware that Mr. Halebian was challenging the adequacy of the settlements on behalf of another former UBS broker.

On November 15, 2006, after learning that the other broker had suddenly exited the litigation, I authorized Mr. Halebian to challenge the adequacy of the settlements on my behalf and to put me forward in place of the other broker. I have regularly discussed with Mr. Halebian his efforts on my behalf in these actions, including discussions about the Court's decisions, the making of an appeal from some of those decisions, and the withdrawal of that appeal.

Appendix B

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was executed at Briarcliff Manor, New York, on January 9, 2007.

_____/s/_____
ANTHONY J. D'ARIA

Signature attestation: I hereby attest that I have on file the holograph signature for the conformed signature indicated above by /s/ in this e-filed document.

_____/s/_____
JOHN HALEBIAN

APPENDIX C — ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF MOTION TO INTERVENE AND OBJECTION TO SETTLEMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED NOVEMBER 16, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF MOTION TO INTERVENE AND OBJECTION TO SETTLEMENT

On November 15, 2006, the Court received a letter from an attorney on behalf of Lawrence R. Kaufmann ("Kaufmann"), dated November 13, 2006, along with Kaufmann's declaration, by which documents Kaufmann notified the Court that Kaufman was withdrawing his motion to intervene in the instant action.

Kaufmann may, without court approval, withdraw his motion to intervene, and the Court considers said motion to be withdrawn. A class member's objections to a proposed class action settlement "may be withdrawn only with the court's approval," however. *See* Fed. R. Civ. P. 23(e)(4)(B). Kaufmann's motion to intervene contains various objections to the proposed settlement in the instant action. Accordingly, the Court must determine whether to approve Kaufmann's request to withdraw said objections, or to deny Kaufmann's request and consider said objections at the January 19, 2007 fairness hearing.

Because plaintiffs and defendants have not had an opportunity to address the issue, the Court will afford the parties an opportunity to brief the matter. Accordingly, no later than December 1, 2006, the parties may file memoranda addressing the issue of whether the Court should approve Kaufmann's motion to withdraw his objections to the proposed settlement. The matter will be taken under submission at that time, unless the Court, after reviewing the parties' submissions, determines oral argument would assist the Court.

IT IS SO ORDERED.

Dated: November 16, 2006

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX D — ANTHONY D'ARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, & FOR OTHER RELIEF OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED NOVEMBER 16, 2006

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

Appendix D

Date: November 17, 2006
Time: 9:00am
Ctrm: 7

Case No. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

ANTHONY D'ARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, & FOR OTHER RELIEF

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on November 17, 2006, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of The Honorable

Appendix D

Maxine M. Chesney, United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, Anthony D'Aria will and hereby does respectfully move this Court:

(1) To add Mr. D'Aria, or substitute Mr. D'Aria for Lawrence R. Kaufmann, as an objector pursuant to the Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing ("the Kaufmann Objections," *Bowman* Docket No. 81);

(2) To add Mr. D'Aria, or substitute Mr. D'Aria for Mr. Kaufmann, as movant and putative intervenor-plaintiff in Kaufmann's Motion to Intervene, for Consolidation and for Other Relief ("the Motion to Intervene," *Bowman* Docket No. 83, *Glass* Docket No. 37); and

(3) For an order, pursuant to L.R. 6-1(b), shortening time for the Court to hear and decide this motion in the hearing scheduled for November 17, 2006.

Memorandum of Points and Authorities

On November 14, 2006, Defendant UBS filed an extraordinary "notice" ("the Notice", *Bowman* Docket No. 133, *Glass* Docket No. 82) that purports to terminate all present and future activity in this litigation by a party

adverse to defendant-objector and putative intervenor-plaintiff Lawrence R. Kaufmann. In particular, the Notice purports to withdraw both the Kaufmann Objections and the Motion to Intervene.

1. The purported "Notice" is defective on its face, and this Court should (a) treat it instead as a motion by Kaufmann for leave to withdraw from his previous role in the litigation, and (b) fully explore the underlying events

As an initial matter, although the Notice purports to announce the withdrawal of the Kaufmann Objections, Rule 23(e)(4)(B) of the Federal Rules of Civil Procedure clearly provides to the contrary that "[a]n objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval." Both on this ground, and because of the highly suspect and irregular events leading to the Notice (discussed below), this Court should treat the Notice as merely a motion for leave to undertake the actions of which it purports to give notice, and should thereupon proceed to explore the underlying facts in a full evidentiary hearing. In furtherance of this factual exploration, Mr. D'Aria should be permitted to depose the participants in the events leading to the Notice and to obtain discovery of all relevant communications among them.

2. The underlying, secret deal between Kaufmann and defendant is highly suspect ethically and legally, and is manifestly intended to derail this Court's consideration of the substantive issues Kaufmann previously raised for the benefit of class members

This highly irregular Notice strongly suggests underlying acts of collusion, fraud, commercial bribery and/or breach of fiduciary duty by Kirby Wilcox, defendant's outside counsel; Vincent P. Browne, defendant's in-house counsel; George L. Mahr, III, Mr. Kaufmann's New Jersey counsel; and Mr. Kaufmann himself. The purported basis for the Notice is a side-deal secretly reached on November 7, 2006, between defendant and Mr. Kaufmann, according to which Mr. Kaufmann agreed to terminate comprehensively all his activities in the interests of other class members in the instant litigation in exchange for release of a private debt owed to UBS. (*See* Exs. A, B and C to the Notice.) The letter and declarations offered in support of the Notice are carefully crafted to provide the least, possible information about this deal—omitting, for example, any information about when negotiations began, by whom they were initiated, or about the conditions under which they were conducted. (*Id.*)

Although on the present record the precise shape of the underlying impropriety remains murky, it is difficult, if not impossible, to imagine a scenario under which such a deal could be consummated without ethical and legal misconduct. It is clear that Mr. Kaufmann has

breached the fiduciary duty to other class members that he took on as putative intervenor-plaintiff and proposed class representative, by negotiating a private deal to abandon, in detail, all his present and future activities for benefit of the class in the instant litigation (preserving only his personal right to "opt in" to the settlement).[1] Mr. Kaufmann has done so for personal financial gain entirely unrelated to any claims in this litigation; in effect, defendant bribed Mr. Kaufmann to collude with defendant in this litigation.[2] In a fraud on

---

1. A class representative is a fiduciary. "He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. . . . He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the State to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549-50 (1949). *See Armour v. Network Assocs.*, 171 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001) (Jenkins, J.). *See also Wang v. Chinese Daily News, Inc.*, 2006 WL 1635423, at *1 (C.D. Cal. May 9, 2006) (granting the plaintiffs' motion to strike the defendants' rule 68 offer of judgment as creating "an unresolvable conflict between class representative's fiduciary duty to the class and their own personal interest").

2. Both Mr. Kaufmann and his secret New Jersey counsel, George L. Mahr, III, reside in New Jersey. Section 2C:21-10 of the New Jersey Criminal Code provides, "A person commits a crime if he solicits, accepts or agrees to accept any benefit as

(Cont'd)

his own counsel, Mr. Kaufmann undertook his negotiations with defendant through separate counsel without ever informing his counsel in the instant litigation, who continued to actively prosecute the Kaufmann Objections and the Motion to Intervene throughout the secret negotiations, and indeed well after the deal was reached. Mr. Kaufmann maintained this silence, and defendant failed to inform this Court of the resulting deal, until one week after the deal was reached, *i.e.*, just a few days before the hearing on the *Bowman* settlement scheduled for November 17, 2006—a subterfuge aimed at preventing argument to the Court of Mr. Kaufmann's earlier objections and motions relating to settlement. Mr. Kaufmann thus not only ceased to defend the interests of other class members, but actively and affirmatively colluded with defendant to undermine those interests.

In every respect, both the deal's terms and its prolonged concealment were manifestly calculated by defendant (and apparently dictated to Mr. Kaufmann) to maximize the adverse impact on the prosecution of objections to the proposed settlements in the instant actions.

(Cont'd)

consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as . . . (2) A trustee, guardian, or other fiduciary." As Messrs. Wilcox, Browne and Mahr all admittedly coordinated or facilitated the payment of the "benefit as consideration" to Mr. Kaufmann to breach his fiduciary duty to class members, all are potentially liable under Section 2C:21-10.

Appendix D

3. To protect the interests of class members on issues originally raised but now abandoned by Kaufmann, former UBS broker Anthony D'Aria should immediately be permitted to join or replace Kaufmann as objector, movant and intervenor-plaintiff

Defendant should not be permitted to quash the Kaufmann Objections and the Motion to Intervene by the simple expedient of buying off the individual class member who made them, thereby benefiting from the illicit and potentially criminal conduct underlying the Notice. As evident from the extensive briefings to this Court in anticipation of the hearing on the *Bowman* settlement scheduled for November 17, 2006, the Kaufmann Objections and the Motion to Intervene raise serious questions about the adequacy of both the *Bowman* and *Glass* settlements. The Notice is a transparent effort to silence those questions without ever reaching their merits. The adequacy of the *Bowman* and *Glass* settlements, however, is a matter that affects all 12,800 potential class members in the actions.

At the same time, Mr. Kaufmann is manifestly no longer able to hold himself out as an objector, intervenor-plaintiff, and putative class representative interested in protecting the interests of other class members, having colluded with defendant to breach his fiduciary duty to class members for private gain, and incidentally committed fraud on his own counsel in this litigation.

Anthony D'Aria therefore seeks leave of this Court to join and, at an appropriate time, to replace Mr. Kaufmann as objector and as movant for intervention, consolidation and other relief in this litigation. As a former UBS broker in New York from April 21, 2001 to June 30, 2006, Mr. D'Aria is fully qualified to object, intervene, and otherwise act as putative class representative to protect the interests of class members in the *Bowman* and *Glass* actions. Allowing the substitution of Mr. D'Aria as putative class representative in place of Mr. Kaufmann would "protect class interests" and so should be permitted. See *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 230 F.R.D. 61, 80 (D. Mass. 2005). As that court noted, such substitution is consistent with the Manual for Complex Litigation. The Manual itself provides:

> Replacement . . . may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation. In such circumstances, courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The court may permit intervention by a new representative or may simply designate that person as a representative in the order granting class certification.

§ 21.26, at 277, Manual for Complex Litigation, Fourth (footnotes omitted). *See also Davis v. Thornburgh*, 903

F.2d 212, 233 (3d Cir. 1990) (Becker, J., dissenting) ("afford[ing] an opportunity to provide a substitute . . . is the common practice").

In the urgent circumstances created by Mr. Kaufmann's and defendant's deliberately disruptive and illicit tactics, Mr. D'Aria respectfully urges the Court to exercise its discretion to waive the timing requirements that would normally apply to his motion, and to hear and decide the motion in his favor in the hearing scheduled for November 17, 2006. This will enable Mr. D'Aria to participate in this litigation immediately in place of Mr. Kaufmann so that the Court's consideration of the proposed *Bowman* and *Glass* settlements may proceed fully and fairly without delay.

Dated: November 16, 2006

Respectfully submitted,

LOVELL STEWART HALEBIAN LLP

By _____*/s/*_____
JOHN HALEBIAN (*Pro Hac Vice*)

Attorneys for Lawrence R. Kaufmann

APPENDIX E — CONSENT TO JOIN FORM FILED SEPTEMBER 25, 2006

CONSENT TO JOIN SETTLEMENT

ANTHONY J. D'ARIA
57 MOUNTAIN RD
PLEASANTVILLE NY 10570-1911

Mail to:

Kevin McInerney, Esq.
McInerney & Jones
18124 Wedge Parkway, Suite 503
Reno, NV 89511

Anthony D'Aria consents to be a party plaintiff in the above action pursuant to Section 16(b) of the Fair Labor Standards Act, and authorizes Class Counsel to act on his/her behalf in all matters relating to this action, including the settment of his/her claims.

Anthony D'Aria
Print or Type Name

s/ Anthony D'Aria
Signature

Date: 9-22-06

Address: 57 Mountain Rd
Pleasantville NY

Telephone #: (914) 769-2602
(646) 220-3327

143 (3)

No. 09-341

Supreme Court, U.S.
FILED
OCT 27 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTHONY D'ARIA,

Petitioner,

v.

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-and-

UBS FINANCIAL SERVICES, INC., a corporation, UBS PAINE WEBBER, a corporation, PAINE WEBBER GROUP, INC., a corporation,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

SANFORD F. YOUNG
LAW OFFICES OF
SANFORD F. YOUNG
225 Broadway
Suite 2008
New York, NY 10007
(212) 227-9755

JOHN HALEBIAN
Counsel of Record
ADAM C. MAYES
LOVELL STEWART
HALEBIAN LLP
317 Madison Avenue
21st Floor
New York, NY 10017
(212) 500-5010

Counsel for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF APPENDICES	ii
TABLE OF CITED AUTHORITIES	iii
PETITIONER'S REPLY BRIEF	1
I. D'Aria Challenges the Entire Proposed Settlement on the Basis of Its Reversionary Fee Structure, Not Merely the Structure's Effect if Attorneys' Fees Were Reduced.	2
II. If There Is Merit in D'Aria's Argument that the Proposed Settlement's Reversionary Fee Structure Inherently Violates the Rights of Absent Class Members, Then the Courts Below Necessarily Erred When They Failed to Grant D'Aria Status as Either an Objector or an Intervenor.	5
CONCLUSION	13

TABLE OF APPENDICES

Page

Appendix A — Declaration Of Kenneth K. Lehn Dated December 15, 2006 ..... 1a

Appendix B — Notice Of Lawrence R. Kaufmann's Withdrawn: (1) Objection To Proposed Settlement And Intention To Appear At Settlement Hearing; And (2) Motions To Intervene, For Consolidation, And For Other Relief Dated November 14, 2006 ... 4a

Appendix C — Notice Of Pendency Of Class Action And Opportunity To Opt In, Proposed Settlement And Hearing Date For Court Approval Dated August 21, 2006 ..... 19a

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 3

Devlin v. Scardelletti,
536 U.S. 1 (2002) 11

In re General Motors Corp.,
55 F.3d 768 (3rd Cir. 1995) 6

In re Global Crossing Secs. & ERISA Litig.,
225 F.R.D. 436, 457 fn.10 (S.D.N.Y. 2004) 12

In re Worldcom,
2005 WL 2319118 (S.D.N.Y. 2005) 12

Laird v. Tatum,
408 U.S. 1 (1972) 3

San Jose Mercury News, Inc. v. U.S. Dist. Court - Northern Dist. (San Jose),
187 F.3d 1096 (9th Cir. 1999) 11

Vollmer v. Selden,
530 F.3d 656 (7th Cir. 2003) 6

Cited Authorities

Page

United States Constitution

First Amendment 3

Statute:

29 U.S.C. § 216 12

Rules:

Fed. R. Civ. P. 23 ..... *passim*

Respondent UBS fails to contest the reasons advanced by Petitioner Anthony D'Aria in support of his petition for certiorari. Instead, UBS asserts two procedural barriers to review that are without merit.

First, contrary to UBS's argument, D'Aria does not seek an advisory opinion. D'Aria's petition seeks to overturn the entire proposed settlement. The question posed is whether the proposed settlement's reversionary fee structure, which has been condemned by legal scholars as a *per se* breach of class counsel's ethical and fiduciary duties to the class, demonstrates both that absent class members were inadequately represented and that the proposed settlement is unfair and inadequate under Rule 23. Contrary to UBS's misguided argument, the question is not where the money would go if the attorneys' fees were slashed.

Second, D'Aria's procedural standing to challenge the proposed settlement comes into question solely because of a perfunctory and inaccurate timeliness analysis in the courts below which ignored blatant manipulation of the settlement approval process by UBS (which UBS attempts to obscure with unsworn and unattributed facts absent from the record below). In the settlement approval process under Rule 23, courts have a fiduciary obligation to safeguard the interests of absent class members. If there is merit in D'Aria's contention that the proposed settlement inherently violates the due process rights of absent class members, then by definition, the courts below failed adequately to protect absent class members' interests when they allowed highly artificial timeliness considerations to deprive D'Aria of procedural status to challenge the settlement.

I. D'Aria Challenges the Entire Proposed Settlement on the Basis of Its Reversionary Fee Structure, Not Merely the Structure's Effect if Attorneys' Fees Were Reduced.

UBS is disingenuous in suggesting that D'Aria seeks an "advisory opinion" on the attorney's fee provision which will not affect the rights of the litigants. The gravamen of D'Aria's petition is that the proposed settlement's reversionary fee structure poisons the entire settlement:

> [A] class action settlement shaped by the ethical conflicts, perverse incentives and procedural distortions of a reversionary fee structure *ipso facto* is not "fair, reasonable and adequate" under Rule 23(e)(2) and should not be approved. . . . [A] reversionary fee structure [also] renders adequate representation under Rule 23(a)(4) impossible, and poses an insurmountable obstacle to settlement-only class certification antecedent to settlement approval.

Pet. Br. 11.

A reversionary fee structure causes *immediate* harm to absent class members' interests, *i.e.*, inadequate representation, and an unfair and inadequate settlement. The damaging consequences of the structure that D'Aria identifies had their effect on the proposed settlement long before the district court was ever called on to consider the proposed attorney's fees. The proposed settlement was shaped by the breaches of class counsel's duties that arise from

payment by an adversary (Pet. Br. 12-13), and by multiple perverse incentives and opportunities to trade class interests for the interests of the plaintiff's counsel and defendants who negotiated it (Pet. Br. 14-16); simply by adopting the reversionary fee structure, class counsel imposed an unjustifiable economic loss on the class (Pet. Br. 16-17); and both objection and judicial review for the benefit of absent class members were inhibited during the settlement approval process (Pet. Br. 17-19)—all irrespective of whether the district court ever actually invoked the reversionary fee provision (indeed, the district court was predictably dissuaded from doing so). Thus, the effects of the reversionary fee structure identified by D'Aria do not concern "a hypothetical state of facts," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) as UBS contends, but are concrete reasons to reject the proposed settlement in its entirety.

For the same reasons, UBS's strained analogy of D'Aria's claims to a non-justiciable "subjective chill" of First Amendment rights, *Laird v. Tatum*, 408 U.S. 1 (1972), is inapposite. No credence should be given UBS's unstated implication that the settlement's structural features challenged by D'Aria are a mere technicality in a proposed settlement that otherwise deserves approval. While D'Aria's petition focuses on the reversionary fee structure because it is the central legal issue raised by the settlement, his wider argument in the courts below identified numerous other, concrete and troubling features of the settlement which are closely related to the conflicts and perverse incentives associated with a reversionary fee structure. Thus, D'Aria alleged in the courts below that:

— The proposed settlement followed a *de minimus* investigation by counsel and 16-page boilerplate complaint, with no adversarial motion practice, discovery, or litigation whatsoever. Class counsel reached a "quickie" settlement in less than four months before UBS even answered any of the underlying complaints that were consolidated solely for purposes of settlement.

— The action's history, intertwined with the settlement of an earlier, related California case, *Bowman v. UBS Financial Services*, Case No. C-04-03525 MMC, suggested a nationwide (ex-California) settlement was collusively pre-packaged without any intention of adversarial litigation.

— Class counsel relied on UBS's data and expert analysis of damages without expert assistance for the class, and settled for what D'Aria calculated (in the only written estimate ever provided to the court) to be 4 or 5 cents on the dollar of claimed losses.

— The legal fees of $11,250,000 for plaintiff's counsel were exorbitant in relation to the negligible prosecution of the action; the district court speculated that the fees represented a lodestar multiplier of at least ten, and the parties did not contradict D'Aria's estimate that the multiplier was over forty.

— The notice to class members failed adequately to disclose the settlement's reversionary structure, both as to legal fees and as to the overall value of the settlement to class members.

Cf. Pet. Br. 7-8.

II. If There Is Merit in D'Aria's Argument that the Proposed Settlement's Reversionary Fee Structure Inherently Violates the Rights of Absent Class Members, Then the Courts Below Necessarily Erred When They Failed to Grant D'Aria Status as Either an Objector or an Intervenor.

1. Starting months before the final approval hearing on the proposed settlement, D'Aria made several applications to challenge the settlement as both an objector and as an intervenor-plaintiff. Either status provides standing to appeal the proposed settlement. The district court and the court of appeals, however, failed to admit D'Aria as either an objector or an intervenor, and thereby avoided any consideration of the merits of his contentions on procedural grounds.

Both with respect to objection and intervention, the procedural barriers erected against D'Aria in the courts below rest on a wholly artificial calculation of his timeliness, as explained below. If D'Aria's contentions concerning the interests of absent class members have any merit, it also follows that the district court abused its discretion (and the Ninth Circuit erred in affirming) when it allowed such a timeliness analysis to deprive

him of any status to challenge the settlement on absent class members' behalf. The rights of absent class members are a principal concern of the settlement approval process established by Rule 23(e), and courts have a fiduciary obligation to safeguard them. *See* Pet. Br. 10-11 (citing cases). The participation of both objectors and intervenors is favored in the settlement approval process because their presence adds an adversarial voice concerning the proposed settlement that serves this purpose. *See, e.g., Vollmer v. Selden*, 530 F.3d 656, 660 (7th Cir. 2003) (intervenors counter-act collusive incentives at settlement stage), *In re General Motors Corp.*, 55 F.3d 768, 803 (3rd Cir. 1995) (objectors valued to provide independently-derived information about settlement merits).

In practical terms, the procedural timeliness issue raised by UBS is ancillary to the merits of D'Aria's substantive challenge to the settlement and certainly does not stand in the way of this Court granting certiorari.

2. A summary timeline of the events concerning D'Aria's timeliness that are discussed below is as follows:

September 22, 2006:

> Lawrence Kaufmann, represented by Lovell Stewart Halebian LLP ("LSH"), counsel to D'Aria here, submits an objection in the related case, *Bowman v. UBS Financial Services*, in which he announces his intention to file a parallel objection in the instant action.

Late September 2006:

UBS contacts Kaufmann behind the back of LSH about withdrawing his *Bowman* objection in exchange for forgiveness of a $102,000 debt to UBS.[1]

October 13, 2006:

Kaufmann files motions through LSH to intervene in both actions.

November 7, 2006:

UBS and Kaufmann secretly reach a formal agreement for Kaufmann's withdrawal from both actions in exchange for forgiveness of his $102,000 debt.

November 14, 2006:

The deadline to file objections in the instant *Glass* action. UBS files notice late in the evening disclosing Kaufmann's withdrawal from both actions (Reply App. B).

November 16, 2006:

More than two months before the final approval hearing in the instant action, D'Aria, represented by Kaufmann's former class action counsel LSH, applies to substitute for Kaufmann as objector and proposed intervenor-plaintiff (Resp. App. D). The district court denies his application the same day before even receiving a response from UBS or class counsel (Pet. App. D).

---

1. *See* Reply App. A, ¶2. The district court, however, sustained a hearsay objection by UBS to this evidence. Resp. App. 6a, fn.

December 1, 2006:

D'Aria files a brief urging the court to preserve Kaufmann's objections in the instant action until D'Aria is able to reassert them.

December 15, 2006:

More than a month prior to the final approval hearing, D'Aria files his own motion to intervene in the instant action.

January 17, 2007:

The district court strikes D'Aria's brief on Kaufmann's objections and permits Kaufmann to withdraw them (Resp. App. A). The court simultaneously denies D'Aria's motion to intervene (Pet. App. C).

January 19, 2007:

Final approval hearing on the proposed settlement.

Cf. Pet. Br. 8, Resp. Br. 3-4.

3. D'Aria originally applied to substitute for objector and proposed intervenor Kaufmann on the morning of November 16, 2006, instead of on November 14—the deadline to object, when UBS first disclosed Kaufmann's withdrawal from the litigation. No practical difficulties whatsoever were posed by the timing of D'Aria's application. D'Aria sought to pursue arguments against the proposed settlement that had already been fully and timely asserted and briefed during the preceding months (by the same counsel) on behalf of Kaufmann. Moreover, D'Aria's application came more

than two months before the final approval hearing on the proposed settlement, scheduled for January 19, 2007.

D'Aria's purported untimeliness results solely from UBS's belated disclosure of Kaufmann's withdrawal on the very evening of the deadline to object. Given the swiftness of D'Aria's initial application to substitute for Kaufmann after that disclosure, there is no doubt that if Kaufmann's withdrawal had been disclosed even a single day earlier, D'Aria would have met the deadline and been able to challenge the proposed settlement (at the very least as an objector) without procedural difficulty. These circumstances strongly suggest that UBS exploited its private leverage against Kaufmann not merely to induce him to withdraw, but also to hide his abandonment of class interests from his own class action counsel while UBS strategically timed his exit to hinder entry of any substitute to speak on behalf of absent class members, such as D'Aria. Kaufmann never disclosed to his own class action counsel that he was negotiating with UBS to sell out class interests for private gain, even after he and UBS reached a formal agreement on November 7, 2006.[2] Apart from being rife with probable legal and ethical impropriety,[3] such a

2. The papers disclosing Kaufmann's withdrawal were filed by UBS, an adverse party. UBS's contrary statement (at Resp. Br. 4) that "*Kaufmann* filed notice of the settlement in the district court and asked the court to withdraw" (emph. added) is false. *See* Reply App. B.

3. D'Aria argued that UBS's deal with Kaufmann amounted under New Jersey law to commercial bribery of Kaufmann to breach his fiduciary duty to class members as a proposed class representative. Resp. App. 17a.

stratagem by UBS directly undermines the process established by Rule 23 to protect absent class members.

As it did in the Ninth Circuit, UBS presents to this Court unsworn and unattributed statements that were never presented to the district court, suggesting that Kaufmann initiated his withdrawal from the litigation.[4] *See* Resp. Br. 3. To the contrary, sworn testimony from Kaufmann's co-counsel in the class action indicated that UBS contacted Kaufmann days after he filed his initial objection in the related case in September, 2006.[5] Reply App. A, ¶2. The bare-bones information that UBS made available to the court (nearly identical declarations by Kaufmann and the attorneys who negotiated his private settlement with UBS, attached to UBS's notice disclosing his withdrawal) artfully omit to state when negotiations of his withdrawal began, reciting only that an agreement was reached on November 7, 2006. Reply App. B. The record on appeal remains effectively incomplete because the district court failed to press UBS for any further clarification of these events.

4. UBS implausibly argues that Kaufmann's withdrawal has no bearing on determining whether

---

4. Specifically, nothing in the record below supports UBS's statements that "UBS had been preparing to sue Lawrence Kaufmann [and] Kaufmann, in turn, was preparing a cross-complaint alleging (among other things) wrongful discharge," or that "Kaufmann's counsel, George Mahr III, then approached UBS. . . ." Resp. Br. 3; *cf.* Reply Apps. A and B (the information actually available to the district court).

5. The court sustained UBS's objection to this evidence as hearsay. Resp. App. 6a, fn.

D'Aria's motions to substitute for Kaufmann and to intervene were timely. Resp. Br. 9; *cf.* Pet. App. 65a-66a (district court holding that D'Aria failed to show reliance on Kaufmann). Long before D'Aria came forward to adopt Kaufmann's objections to the proposed settlement as his own, however, D'Aria was not only aware of the objections, but actually provided assistance and information to Kaufmann's class action counsel to prosecute them during September and October 2006 when they were being formulated and briefed to the court. Resp. App. 8a (D'Aria declaration).

D'Aria's obligation to move for intervention is properly measured not from when he learned merely that his interests were at stake in the litigation, but from when he learned that his interests were no longer represented by the existing parties to the litigation. *San Jose Mercury News, Inc. v. U.S. Dist. Court - Northern Dist. (San Jose)*, 187 F.3d 1096, 1101 (9th Cir. 1999) (In measuring delay in seeking intervention, the inquiry looks to when the intervenor became aware its interests would no longer be adequately protected by the parties). As a proposed intervenor and class representative, Kaufmann expressly sought to represent other absent class members—surely not least among them D'Aria, who personally assisted Kaufmann's motions and objections. Moreover, as an objector, Kaufmann was a party to the action. *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Hence, there was no reason, and no legal requirement, why D'Aria himself needed to duplicate Kaufmann's objections and motions. D'Aria only learned Kaufmann had traded the interests of other absent class members for a private deal when UBS disclosed Kaufmann's withdrawal, whereupon D'Aria immediately—and timely—acted to take up Kaufmann's

abandoned role. The district court thus clearly erred in denying intervention on timeliness grounds.

5. For similar reasons, assuming that DAria's contentions are meritorious, he should also have been granted the status of an objector. In the class action settlement approval process, courts may and regularly do consider the merits of procedurally defective objections. *See, e.g., In re Worldcom*, 2005 WL 2319118 at *1 fn.3, *13 fn.23 (S.D.N.Y. 2005) (two late objections addressed); *In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 457 fn.10 (S.D.N.Y. 2004) (six late objections considered without deciding whether untimeliness excusable). It was an abuse of discretion for a court with a fiduciary duty to absent class members to disregard a meritorious objection when the objection was in practice presented in good time, and the procedural defect was entirely due to a deliberate stratagem of the defendants.

UBS notes that D'Aria also submitted a consent to join the action, Resp. Br. 3 and 9, but this has no bearing on his right to object to (or intervene in) the proposed settlement. Unlike a Rule 23 class action from which class members have the right to "opt out", the collective action procedure established by the Fair Labor Standards Act, 29 U.S.C. § 216, requires participants to affirmatively "opt in". In the settlement context, therefore, a form of consent to join the collective action serves a similar purpose as a claim form in a conventional class action. Indeed, the settlement notice sent to class members in this action (which is both a collective action and a Rule 23 class action) expressly contemplates that objectors may also submit consents to join in order to assure their participation in the final settlement. *See* Reply App. C (excerpt of settlement notice).

CONCLUSION

For the foregoing reasons, D'Aria's petition for a writ of certiorari should be granted.

Respectfully submitted,

SANFORD F. YOUNG
LAW OFFICES OF
SANFORD F. YOUNG
225 Broadway
Suite 2008
New York, NY 10007
(212) 227-9755

JOHN HALEBIAN
Counsel of Record
ADAM C. MAYES
LOVELL STEWART
HALEBIAN LLP
317 Madison Avenue
21st Floor
New York, NY 10017
(212) 500-5010

Counsel for Petitioner

APPENDIX

APPENDIX A — DECLARATION OF KENNETH K. LEHN DATED DECEMBER 15, 2006

JOHN HALEBIAN (*Pro Hac Vice*)
ADAM C. MAYES (SBN 200188)
LOVELL STEWART HALEBIAN LLP
500 Fifth Avenue, 58th Floor
New York, NY 10110
Tel: (212) 608-1900
Fax: (212) 208-6806
212 Wood Street
Pacific Grove, CA 93950
Tel: (831) 333-0309
Fax: (831) 333-0325
jhalebian@lshllp.com

Attorneys for Anthony D'Aria, Intervenor-Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-06-04068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. et al.,

Defendants.

DECLARATION OF KENNETH K. LEHN IN SUPPORT OF ANTHONY D'ARIA'S MOTION TO INTERVENE

Appendix A

Date: January 19, 2007
Time: 9:00 a.m.
Ctrm: 7
Judge: Hon. Maxine M. Chesney

I, Kenneth K. Lehn, declare as follows:

1. I am an attorney licensed to practice in the State of New Jersey and a principal in the law firm of Winne, Banta, Hetherington, Basralian & Kahn, P.C., located in Hackensack, New Jersey. I am counsel to Lawrence R. Kaufmann concerning wage and hour actions against his former employers. Except where otherwise indicated, I have personal knowledge of the facts stated in this declaration, and if called upon to do so could and would competently testify to them.

2. In a telephone conversation on November 15, 2006, Mr. Kaufmann told me that UBS had contacted other counsel he retained in New Jersey (Mahr and Mahr, L.L.C.) about Mr. Kaufmann's indebtedness of $102,000 to UBS within days after his litigation counsel, Lovell Stewart Halebian LLP, filed Mr. Kaufmann's objections to the proposed settlement in *Bowman et al. v. UBS Financial Services, Inc.*, Case No. C-04-03525 MMC (*Bowman* docket no. 81).

3. On earlier occasions in October and November, 2006, when Mr. Kaufmann and I discussed issues regarding both the *Bowman* and *Glass* actions against UBS and other claims by him against other brokerage firms, he never disclosed to me that he was secretly

negotiating with or had reached a deal with UBS to withdraw his objections and motions in *Bowman* and in *Glass*.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was executed at East Orange, New Jersey, on December 15, 2006.

/s/
KENNETH K. LEHN

Signature attestation: I hereby attest that I have on file the holograph signature for the conformed signature indicated above by /s/ in this e-filed document.

/s/
JOHN HALEBIAN

APPENDIX B — NOTICE OF LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF DATED NOVEMBER 14, 2006

M. KIRBY C. WILCOX (SB# 78576)
kirbywilcox@paulhastings.com
PAUL, HASTINGS, JANOFSKY & WALKER LLP
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105-3441
Telephone: (415) 856-7000
Facsimile: (415) 856-7100
Attorneys for Defendant
UBS FINANCIAL SERVICES INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

Appendix B

CASE NO. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

NOTICE OF LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF

Date:	November 17, 2006
Time:	9:00 a.m.
Courtroom:	7
Judge:	Hon. Maxine M. Chesney

TO THE COURT AND ALL INTERESTED PARTIES:

Appendix B

PLEASE TAKE NOTICE THAT Lawrence R. Kaufmann ("Kaufmann") has withdrawn (1) his "Objection to the Proposed Settlement and Intention to Appear at the Settlement Hearing" in *Bowman v. UBS Financial Services, Inc. ("Bowman")* (C-04-03525 MMC) (Docket No. 81) and (2) his "Motion to Intervene, For Consolidation And For Other Relief" (Docket No. 83) in *Bowman* (Docket No. 83) and in *Glass v. UBS Financial Services, Inc.* ("*Glass*") (C-06-04068 MMC) (Docket No. 37) that he previously filed before this Court. The circumstances surrounding Kaufmann's withdrawal of such motions are provided in the attached documents (marked Exhibits A through C): (1) Letter from Kaufmann's attorney, George L. Mahr III, notifying the Court that Kaufmann has withdrawn these motions, (2) Kaufmann Declaration, and (3) Declaration of Vincent P. Browne.

DATED: November 14, 2006

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: /s/
M. KIRBY C. WILCOX

Attorneys for Defendant
UBS FINANCIAL SERVICES INC.

Appendix B

EXHIBIT A

MAHR AND MAHR, L.L.C.
ATTORNEYS AT LAW
80 MAIN STREET
P.O. BOX 534
MADISON, N.J. 07940
(973) 377-1961
FAX (973) 377-3705
CONCENTRATE PRACTICE IN
SECURITIES ARBITRATION & LITIGATION
AND CORPORATE LITIGATION

November 13, 2006

VIA UPS NEXT DAY DELIVERY

Judge Maxine Chesney
United States District Court
Northern District of California
450 Golden Gate Avenue, Dept. 7
San Francisco, CA 94102

Re: Notice of Withdrawn (1) "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" in *Bowman v. UBS Financial Services, Inc.* ("*Bowman*") (C-04-03525 MMC) and (2) "Motion to Intervene, for Consolidation and for Other Relief" in *Bowman* and *Glass v. UBS Financial Services, Inc.* ("*Glass*") (C-06-04068 MMC)

Appendix B

Dear Judge Chesney:

Please be advised that I represent Lawrence R. Kaufmann, a former employee of UBS Financial Services, Inc. I write to you to notify you of my client's decision to *with* the following:

(1) His "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" (Docket No. 81) in *Bowman* and

(2) His "Motion to Intervene, for Consolidation and for Other Relief" in *Bowman* (Docket No. 83) and *Glass* (Docket No. 37) that he previously filed before this Court.

In summary, on December 13, 2001, UBS Financial Services Inc., ("UBSFS") loaned Mr. Kaufmann a significant sum of money, which UBSFS agreed to forgive over a number of years of services performed by Mr. Kaufmann. His employment ended before the lapse of that time period. UBSFS has demanded repayment of the balance of this loan.

In settlement of their differences, Mr. Kaufmann proposed, through me, that if UBSFS forgave the entire outstanding loan balance, Mr. Kaufmann would agree to the following:

Appendix B

1. To withdraw with prejudice his "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" filed on September 21, 2006 in *Bowman*;

2. To withdraw with prejudice his "Motion to Intervene, for Consolidation and for Other Relief' filed on October 13, 2006 in *Bowman* and *Glass;*

3. To file no other objections to the proposed *Bowman* Settlement and to file no objections to the proposed *Glass* Settlement;

4. Not to appear (either personally or through counsel) at the final approval hearing for the proposed *Bowman* Settlement on November 17, 2006, or for the proposed *Glass* Settlement on January 19, 2007, or an any other dates that the Court may schedule for such hearings;

5. Not to appeal the final settlements in *Bowman* or *Glass;* and

6. To file a notice of claim in *Glass* and not to opt out.

On November 7, 2006, UBSFS and Mr. Kaufmann reached a formal Settlement Agreement which included all of the above terms. I represented Mr. Kaufmann throughout the negotiations of this Agreement and the above facts are also set forth in Mr. Kaufmann's **enclosed** Declaration.

Therefore, please be advised that Mr. Kaufmann hereby withdraws with prejudice his "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" filed on September 21, 2006 in *Bowman*. Mr. Kaufmann further withdraws with prejudice his "Motion to Intervene, for Consolidation and for Other Relief' filed on October 13, 2006 in *Bowman* and *Glass*.

Thank you for your consideration of this matter. Should you have any questions with regard to this matter as it relates to Mr. Kaufman, kindly contact me.

Respectfully submitted,

MAHR and MAHR, LLC
Attorneys for Lawrence R. Kaufmann

s/ George L. Mahr, III

Appendix B

By: George L. Mahr, III

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

CASE NO. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Appendix B

Defendants.

DECLARATION OF LAWRENCE R. KAUFMANN REGARDING HIS WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF

I, Lawrence R. Kaufmann, declare:

1. If called as a witness, I would and could competently testify to all facts within my personal knowledge except where stated upon information and belief.

2. On December 13, 2001, UBSFS loaned me a significant sum that UBSFS agreed to forgive over a period of years of service. I executed a Promissory Note in favor of UBSFS for this loan.

3. My employment with UBSFS terminated before the lapse of the forgiveness period, and in August of 2003 and again in July of 2004 UBSFS made a demand for repayment of the balance, plus interest.

4. In compromise of the demand for repayment, I, through my attorney George L. Mahr III, proposed to UBSFS that, if it forgave the outstanding balance, I, among other things, would:

- Withdraw with prejudice the "Objection Of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" filed on September 21, 2006 in

Bowman;

- Withdraw with prejudice the "Motion to Intervene, for Consolidation and for Other Relief" filed on October 13, 2006 in *Bowman* and *Glass;*

- Not file any other objections to the Proposed *Bowman* Settlement or to file an objection to the Proposed *Glass* Settlement;

- Not appear (either personally of through counsel) at the final approval hearing for the Proposed *Bowman* Settlement on November 17, 2006 or for the Proposed *Glass* Settlement on January 19, 2007, or on any other dates that the Court may schedule for such hearings;

- Not appeal the final settlements in *Bowman* or *Glass;* and

- File a notice of claim in *Glass* and to not opt out.

5. On November 7, 2006, UBSFS and I reached a Settlement Agreement which included these terms, among others.

6. I hired my attorney, George L. Mahr III to represent me in resolving this matter. Mr. Mahr dealt exclusively with UBSFS to negotiate this agreement on my behalf and carried out my wishes. I did not directly

negotiate with UBSFS.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10, 2006 at Madison, N.J.

/s/ Lawrence R. Kaufmann
Lawrence R. Kaufmann

Appendix B

EXHIBIT C

M. KIRBY C. WILCOX (SB# 78576)
kirbywilcox@paulhastings.com
PAUL, HASTINGS, JANOFSKY & WALKER LLP
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105-3441
Telephone: (415) 856-7000
Facsimile: (415) 856-7100

Attorneys for Defendant
UBS FINANCIAL SERVICES INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

CASE NO. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

DECLARATION OF VINCENT P. BROWNE REGARDING LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF

I, Vincent P. Browne, declare:

1. I am an attorney at law licensed to practice before the Courts of the State of New Jersey. I am currently Executive Director and Deputy General Counsel for UBS Financial Services Inc. ("UBSFS"). If called as a witness, I would and could competently testify to all facts within my personal knowledge except where stated upon

information and belief.

2. On December 13, 2001, UBSFS loaned Lawrence R. Kaufmann ("Kaufman") a significant sum that UBSFS agreed to forgive over a period of years of service. Kaufmann executed a Promissory in favor of UBSFS for this loan.

3. Kaufmann's employment with UBSFS terminated before the lapse of the forgiveness period, and in August of 2003 and again in July of 2004 UBSFS made a demand for repayment of the balance, plus interest.

4. In compromise of the demand for repayment, Kaufmann, through his attorney George L. Mahr III, proposed to UBSFS that, if it forgave the outstanding balance, he would:

- Withdraw with prejudice the "Objection Of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" filed on September 21, 2006 in *Bowman*;

- Withdraw with prejudice the "Motion to Intervene, for Consolidation and for Other Relief" filed on October 13, 2006 in *Bowman* and *Glass*;

- Not file any other objections to the Proposed *Bowman* Settlement or to file an objection to the

Appendix B

Proposed *Glass* Settlement;

- Not appear (either personally or through counsel) at the final approval hearing for the Proposed *Bowman* Settlement on November 17, 2006 or for the Proposed *Glass* Settlement on January 19, 2007, or on any other dates that the Court may schedule for such hearings;

- Not appeal the final settlements in *Bowman* or *Glass*; and

- File a notice of claim in *Glass* and to not opt out.

5. On November 7, 2006, UBSFS and Kaufmann reached a Settlement Agreement which included these terms, among others.

6. I dealt exclusively with George L. Mahr III to negotiate this agreement with and never with Mr. Kaufmann. Mr. Mahr assured me that the terms of our settlement were within the scope of his representation of Kaufmann.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10, 2006 at Weehawken, New Jersey.

/s/ Vincent Browne
Vincent Browne

APPENDIX C — NOTICE OF PENDENCY OF CLASS ACTION AND OPPORTUNITY TO OPT IN, PROPOSED SETTLEMENT AND HEARING DATE FOR COURT APPROVAL DATED AUGUST 21, 2006

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. C-06-4068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES INC., and DOES 1 through 50, inclusive,

Defendants.

NOTICE OF PENDENCY OF CLASS ACTION AND OPPORTUNITY TO OPT IN, PROPOSED SETTLEMENT AND HEARING DATE FOR COURT APPROVAL

* * *

C. ***Objecting to the Settlement.***

* * *

Any Class Member who does not object to the Settlement in the manner described above will be deemed to have waived any objections and will be

foreclosed from making any objection (whether by appeal or otherwise) to the Settlement. If the Court rejects your objection, you will still be bound by the terms of the Settlement with respect to your non-FLSA claims in all instances, and your FLSA claims if you submit a valid and timely Consent to Join Settlement Form, unless you also submit an Exclusion Form in the manner described in this Notice.

* * * *